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BYTHEWOOD & JARMAN'S

CONVEYANCING.

FOURTH EDITION.

Vol. VI.

REGISTRY—SETTLEMENTS. SPECIAL PRECEDENTS.

MIDDLE TEMPLE

Feb 3 - 1890

BYTHEWOOD & JARMAN'S

SYSTEM OF CONVEYANCING.

A SELECTION OF

PRECEDENTS IN CONVEYANCING

TAKEN FROM MODERN MANUSCRIPT COLLECTIONS AND DRAFTS OF ACTUAL PRACTICE;

WITH

Dissertations and Practical Notes:

BY THE LATE

W. M. BYTHEWOOD, THOMAS JARMAN, & GEORGE SWEET,

BARRISTERS-AT-LAW.

Fourth Edition,

BY

LEOPOLD GEORGE GORDON ROBBINS,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

VOL. VI.

REGISTRY—SETTLEMENTS. SPECIAL PRECEDENTS.

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PREFACE

TO THE

SIXTH VOLUME OF THE FOURTH EDITION.

This Volume has been kept back from publication for two reasons.

First, because a Bill for amending the law with regard to registration and title to land has been before Parliament during the last two Sessions, which Bill, if it had passed into law, would have rendered necessary an examination of its provisions under the heading of "Registry" in the present Volume; and it would also, to some extent, have modified the form of real settlements, inasmuch as the conveyance of the land would have been effected by entry on the register, leaving it to the deed of settlement merely to declare the uses, trusts, powers and provisions intended to attach to or affect the legal seisin.

Secondly, because the subject of Settlements was not discussed in the last edition of this Work, the Volume intended to deal with this subject never having been written. The present Editor had, therefore, no longer, in treating of settlements (as he had in the case of most other subjects treated of in this Work), the great advantage of being able to refer to and adapt to present requirements the observations of his learned and able predecessor, the late Mr. George Sweet; and he found, as might well be expected, that there was little in the

"Settlement" Volume of the first edition (Vol. IX., published in 1834), which was of practical use at the present time. The great and laborious task was, therefore, thrown upon the present Editor, of preparing an entirely new treatise on this important subject, and of settling precedents from such materials as he was able to obtain.

Volume VI. is thus the last in point of time, though not in order of arrangement, of the present series of seven volumes, and "Bythewood & Jarman's System of Conveyancing" is now again, after the lapse of more than half a century, issued to the Legal Profession in a complete form.

The present Editor can truly assert that no small amount of pains, research, and labour has been expended on the part of himself and of those who have been associated with him, in their endeavour to render this Work as complete and correct as in them lay. But it is impossible within any reasonable compass to discuss every point, or to frame precedents to meet every case, that may arise in conveyancing practice; and, moreover, on points of law not yet covered by judicial decision even the most careful consideration may lead different writers to opposite conclusions, one or other of which must sooner or later be judicially overruled. The Editor, however, ventures to express the earnest hope—and he trusts he may be permitted to do so without arrogance or presumption—that this Work, notwithstanding any errors of omission or commission, may be of real service to members of both branches of the Legal Profession, who are concerned in the preparation of conveyancing instruments, and advising on points of conveyancing law and practice.

In the preparation of the Dissertation on Settlements

the Editor has had the able assistance of Mr. A. C. Eddis, of Lincoln's Inn, by whom the greater part of it was originally written, and in consultation with whom the whole, as it now stands, has been revised and completed. The sheets of the Precedents have been revised by Mr. A. Turnour Murray, of Lincoln's Inn, who has also materially helped with suggestions and advice in their preparation.

The Editor, in taking leave of this Work, which has continuously engaged and interested him for the last seven years, takes the opportunity of tendering his cordial and grateful acknowledgments, not only to his learned friends, namely, Mr. H. M. Keary, Mr. A. C. Eddis, Mr. Richard Booth, Mr. Ralph Thicknesse, and Mr. A. Turnour Murray, to whose painstaking and able collaboration during the progress of the work he owes more than he can adequately express, but also to the numerous members of both branches of the Legal Profession, who have, with the utmost kindness and liberality, assisted him by suggestions and counsel, by discussion of points of law, by information on points of practice, by the loan of manuscript precedents or copies of instruments in actual use, and by other valuable assistance.

L. G. GORDON ROBBINS.

Lincoln's Inn,
December, 1889.

CONTENTS.

PAGE

TABLE OF CASES xxv

TABLE OF STATUTES xli

ADDENDA ET CORRIGENDA xlvii

REGISTRY.

PRELIMINARY DISSERTATION.

CHAPTER I.

The Middlesex Registry, 2—The Yorkshire Registry, 9—Non-Registration of Wills, 14—Points decided upon the Registry Acts, 15.

PRECEDENTS ..... 20—25

I. General Form of a Memorial of a Deed 20

II. Memorial of Mortgage by way of Underlease, Registered at the Same Time as the Lease, and written under the Memorial thereof 21

III. Certificate of Satisfaction of Mortgage 21

IV. Memorial of a Judgment 22

V. Memorial of a Will 23

VI. Affidavit of the Execution of a Deed and Memorial 24

VII. Affidavit of the Execution of the Memorial of a Will 24

RELEASES.

PRELIMINARY DISSERTATION.

Definition of a Release, 26—What amounts to a Release, 26—Who is Competent to Make, and who may take advantage of a Release, 29—To what Demands Releases Extend both as to their Nature and Time of becoming Due, 35—Whether the General Words of a Release are Controlled by the Recitals, 44—Releases to Trustees and Executors, 47—Form and Contents of Deeds of Release, 49.

PRECEDENTS ..... 52—89

I. Mutual Release of all Claims by Two Persons 52

II. Mutual Release of all Claims between a Partnership Firm and an Individual 53

III. Mutual Release of all Claims by Three Persons, where a Particular Transaction is recited 53

IV. Release from Creditor to Debtor on Receiving a Sum of Money in satisfaction of Disputed Claims 54

V. Release by Remainderman of Actions on Account of Waste committed by Tenant for Life, the Releasor's Father 56

VI. Release of Dower and Freebench 57

VII. Release of Powers of Jointuring and Charging Portions for Younger Children 58

VIII. Release from a Jointure Rent-charge of Part of the Lands Charged therewith, and Surrender of Term created for Securing the Rent-charge 60

IX. Release of Rent-charge to Owner in Fee of Lands charged therewith, so as to keep the Rentcharge on foot 62

X. Release by a Mortgagee of Part of Settled Lands intended to be Sold by the Tenant for Life under his Statutory Powers 64

XI. Release by Deed-poll by Legatee and her Husband, of Lands charged with Payment of Two Pecuniary Legacies 65

XII. Release of all Demands from a Residuary Legatee, after attaining the age of twenty-one years, to Executors and Trustees 67

XIII. General Release from a Residuary Legatee to a Surviving Executor, with Special Recitals of Transactions in the Trust, by which Losses had accrued, and the Executors had incurred responsibility. Covenant of Indemnity against the Covenants in Leases assigned by the Executor to the Legatee 69

XIV. Release and Indemnity by some of the Persons Beneficially Interested under a Will, to the Trustees Carrying on the Testator's Trade without Authority 75

XV. Release by Residuary Legatees of their Shares in a Legacy, in Confirmation of a Gift Void for Remoteness 77

RELEASES—*continued.*

PAGE

XVI. Release to Trustees of a Will upon Distribution of the Trust Property between the Testator's Two Children, a Daughter's Share being transferred to Trustees of her Marriage Settlement 79

XVII. Release to Trustees of a Marriage Settlement upon Distribution of the Settled Funds, the Dealings with the Funds being set out in a Schedule 82

XVIII. Release to a Retiring Trustee of a Settlement 85

XIX. Release of a Right of Way, by Endorsement on the Deed of Grant thereof 86

XX. Release of a Right of Way in consideration of a Grant of a new Right of Way over other Lands 87

SEPARATION DEEDS.

PRELIMINARY DISSERTATION.

1. **Nature and Effect of Separation Deeds.**—Validity of Agreements for Separation, 90—Consideration necessary to Support Separation Deeds and Agreements, 92—Determination and Avoidance of Separations, 98—Effect of Separation Deeds, &c., 100.

2. **Form and Contents of Separation Deeds.**—Parties, 103—Recitals, 104—Separation Clauses, 105—Property Clauses, 107—Clauses as to Custody of Children, 109—Subsidiary Clauses, 112.

PRECEDENTS .....113—123

I. Deed of Separation, the Husband allowing the Wife an Annuity during the Joint Lives, which is to be paid to her Father, the Trustee, while the Wife lives with him. Covenant by the Trustee to Indemnify the Husband against Wife's Debts. Other usual Covenants. Proviso Vacating the Deed on Reconciliation. (A Concise Form) 113

II. Deed of Separation between Husband and Wife. Special Clause against Molestation by Husband. Settlement by Husband of a Sum of Stock for the Benefit of the Wife for her Life, with remainders for the Benefit of Herself and the Children of the Marriage. Provisions as to Custody, Maintenance, &c., of Children. Usual Indemnity Clause by Trustee 117

III. Deed of Separation on Compromise of Proceedings for Divorce brought by the Wife, who Purchases an Annuity in the Names of Trustees for Benefit of the Husband 123

SETTLEMENTS.

PRELIMINARY DISSERTATION.

CHAPTER I.

INTRODUCTORY CHAPTER—AS TO SETTLEMENTS GENERALLY.

What is a Settlement, 126—Different kinds of Settlements, 127—Advisability of Settlements on Marriage, 129.

CHAPTER II.

WHO MAY MAKE SETTLEMENTS.

As to Settlors Generally, 131—Settlements by Married Women, 131—Disability of Infancy, 143—Disability of Lunacy, 159—Disability of Bankruptcy, 159—As to Felons, &c., 161—As to Aliens, 161—Settlements on Marriages with Foreigners, 161.

CHAPTER III.

OF CONSIDERATIONS AND VOLUNTARY SETTLEMENTS.

Of Different Kinds of Considerations, 164—Of the Consideration of Marriage, 166—The Stat. 27 Eliz. c. 4...167—The Stat. 13 Eliz. c. 5...176—The Bankruptcy Act, 1883...181—The Bills of Sale Acts, 185—The Customs and Inland Revenue Act, 1881...186—Of the Enforcement of Voluntary Settlements, 188.

CHAPTER IV.

OF OBLIGATIONS TO SETTLE PROPERTY ARISING FROM CONTRACT OR OTHERWISE.

1. **Marriage Articles.**—Of Articles for a Settlement Generally, 195—Of Executory Trusts, 197—Form of Articles for a Settlement, Statute of Frauds, 200—What are "Usual Clauses" in Settlements, 205.
2. **Rectification of Marriage Settlements,** 207.
3. **Representation,** 211.
4. **Wife's Equity to a Settlement,** 214

CHAPTER V.

As to Modes of Bringing into Settlement Different Kinds of Property.

1. **Real Property and Chattels Real.**—Freeholds generally, and herein of Covenants for Title, 216—Freeholds by way of Real Settlement, 223—Freeholds upon Trust for Sale, 224—Copyholds, 234—Leaseholds, 236.

2. **Personal Property.**—Mortgage Debts, 237—Portions, 238—Undivided Shares of Personalty, &c., 239—Corporeal Chattels, 240—Stocks, Funds, Shares, and Securities, 241—Debts, 242—Reversionary Interests, 244—Policies of Life Assurance, 244.

CHAPTER VI.

Of Personal Settlements.

1. **The Commencement, Date, Parties, Recitals,** 250.

2. **The Testatum.—Declaration of Trusts.**—Form of Testatum, 253—Trusts till Marriage, 254.

3. **The Investment of Trust Funds.**—Statutory Investments, 255—Express Trusts for Investment, 264—Duties and Liabilities of Trustees as to Investments, 270.

4. **Trusts for Payment of Income.**—Life Interest of Husband, Forfeiture on Alienation or Bankruptcy, 284—Life Interest of Wife, —Restraint on Anticipation, 290.

5. **Provisions for Children and Issue.**—Power to Appoint to Children, &c., 299—Trusts for Children in Default of Appointment, 303—Hotchpot Clause, 303—Maintenance and Accumulation, 304—Advancement, 311.

6. **Ultimate Trusts in Default of Issue,** 315.

7. **Covenants to Settle After-acquired Property, &c.**—As to Property of Husband, 320—As to Property of Wife, 321—Nature and Extent of the Covenant, 323—Form of the Covenant, 331—Restrictions and Exceptions, 332—Power to Withdraw Funds from Settlement, 334.

8. **Trustee Clauses.**—Trustees' Receipts, 335—Appointment of New Trustees, 339—Indemnity and Reimbursement of Trustees, 343—Power for Trustees to Compound, &c., 356.

CHAPTER VII.

1. **Of the Rights of Husbands and Wives in each other's Real Estate.**—Wife's Interest in Her Husband's Freeholds and Copyholds of Inheritance, 358—Husband's Interest in his Wife's Freeholds of Inheritance, 361—Dower and Curtesy in Respect of Expired and Determinable Estates of Inheritance, 370.

SETTLEMENTS—*continued.*

2. **Of Real Settlements Generally.**—Origin and Progress of Real Settlements, 371—Settlements of Realty on Marriage, 374—Family Resettlements, 376.
3. **Parties and Recitals,** 383.
4. **Of Limitation in Real Settlements.**—Limitation of Use till Marriage, 384—Pin-money, 384—Estates for Life, Waste, 387—Limitations to Trustees to Preserve Contingent Remainders, 398—Jointure Rent-charges, 401—Limitations of Portions Term, 403—Estates Tail, &c., 432.
5. **Of Powers.**—The Settled Land Acts, 436.
6. **Of Shifting Clauses.**—General Rules as to Framing Shifting Clauses, 499—Succession to Title or to Another Estate, 499—Name and Arms Clauses, 502—Conditions as to Residence, 503.
7. **Of Renewable Leaseholds,** 505.
8. **Of the Settlement of Personalty to go with Realty,** 511.
9. **Trustee Clauses in Real Settlements,** 517.

CHAPTER VIII.

DISENTAILING ASSURANCES. THE FINES AND RECOVERIES ACT.

Freeholds, 521—Copyholds, 524—Protector of Settlements, 525—Exclusion of Equitable Jurisdiction of Court, 533—Entailed Money, 535—Statute of Limitations, 537—Quasi Entails, 538.

CHAPTER IX.

Stamp Duties on Settlements, 540.

PRECEDENTS .....544—793

I. Settlement on Marriage of a Sum of Stock belonging to the Wife, the Income to be paid to the Wife without power of anticipation for her Life; and after her Death to the Husband for his Life. Trusts for Issue, and Usual Clauses. Ultimate Trust for Wife in Default of Issue. Covenant to Settle After-acquired Property. Power for Wife upon a Future Marriage to Withdraw Funds from Settlement in Proportion to Number of Children of Intended Marriage. Trustee Clauses 544

II. Settlement on Marriage (without recitals) of Railway Shares, &c., and Foreign Bonds passing by Delivery, belonging to the Intended Husband. Usual Trusts for the Husband for Life, for the Wife surviving for her Life, and in Favour of the Issue of the Marriage. Ultimate Trust for Husband 553

SETTLEMENTS—*continued.* PAGE

III. Settlement on Marriage of a Policy of Insurance effected on the Life of the Intended Husband in his own name, for the Benefit of the Intended Wife and the Issue of the Marriage 557

IV. Settlement on Marriage of a Sum of Money secured by the Covenant of the Wife's Father, payable within a year after his Death. Trust of Income for Wife for her Life. Power to the Wife to Bequeath a Life Interest to any Husband. Trusts after Death of Wife in favour of her Children by any Marriage as she shall Appoint; and in Default of Appointment for such Children in Equal Shares 562

V. Transfer of Mortgage (by Endorsement on the Mortgage Deed) previously to Marriage, Upon Trusts which are declared by a Separate Deed of Settlement 564

VI. Settlement on Marriage of a Sum secured by a Mortgage, which has been transferred to the Trustees by a Deed of Even Date (see last Precedent) and of a Further Sum secured by a Bond, both sums being the Property of the Intended Wife. Trusts in favour of the Wife for Life, then the Husband for Life, then of the Children of the Marriage, Daughters to have shares double of those of Sons. Trust, in Default of Children, for Wife's Brother charged with an Annuity in favour of the Wife's Sister during her Life. Power for Wife to Borrow a Part of the Trust Funds, insuring her Life, Trusts of Insurance Moneys. Power for Trustees to accept Composition in respect of the Bond-Debt..... 567

VII. Assignment on Marriage of a Portion belonging to the Intended Wife, raiseable out of Settled Lands, of which her Eldest Brother is Tenant for Life, to the Trustees, to be held by them upon the Trusts for an Indenture of Settlement of Even Date 572

VIII. Settlement on Marriage of a Portion belonging to the Intended Wife, which has been assigned to the Trustees by an Indenture of Even Date (see last Precedent), and of Several Policies of Assurance on the Life of the Husband which have been effected by Him in his own Name. First Life Interest is given to Wife, with Power for Trustees to pay Income to the Husband or to Wife's Bankers. Second Life Interest to Husband terminable on Bankruptcy, &c. Trusts for Issue (Special). Provisions for keeping up the Policies. Power for Husband to Redeem Policies 573

IX. Settlement on Marriage of Stock in the Funds, and a Bond Debt belonging to the Intended Husband, and a share in a Residue under a Will belonging to the Intended Wife. Usual Limitations for the Benefit of the Respective Settlors, and the objects of the Intended or any Future Marriage, with the Ultimate Trusts of the Respective Properties for the Benefit of the Respective Settlors (a concise form) 579

X. Settlement on Marriage of a Gross Sum covenanted by the Husband to be paid by him on the Marriage, and of a

SETTLEMENTS—*continued.* PAGE

Reversionary Interest of the Wife, derived under the Marriage Settlement of her Parents, and on Appointment. Proviso that the Sum secured by Husband's Covenant shall not be called in during his Lifetime. Covenants by Wife's Father to pay an Annuity during joint lives of himself and his Wife, and to make up Wife's Reversionary Interest to a certain amount. Power to Invest Trust Monies in Purchase of Land; Power to Apportion Blended Funds; Power for surviving Husband or Wife to withdraw Trust Funds from Settlement on a Future Marriage; Power for Husband and Wife respectively to Appoint his and her own Trustees 582

XI. Settlement on Marriage of a Share of the Residuary Estate of a Deceased Testator, belonging to the Wife, and of several Policies of Assurance on the Life of the Husband, effected in the names of the Trustees. Covenant by the Husband's Father for payment to the Trustees, six months after the Marriage, of a Sum of Money, with Interest till Payment. Power for Trustees to forbear requiring Payment. Covenants by Wife's Father to Pay an Annuity during his Life, and also to leave to her by his Will a Share of his Estate equal to that of any other Child. Power for Trustees to Invest Trust Monies in Purchase of a Residence 591

XII. Settlement on Marriage of the Intended Wife's Reversionary Interest in a Sum of Stock and of a Policy of Assurance on the Life of the Husband. Trust to pay Annuity to Wife and subject thereto to pay Income to Husband for Life or until Alienation, &c.; Remainder to Wife for Life. Trusts for Benefit of the Children of the Intended Marriage and also of the Child of the Husband by a Former Wife 601

XIII. Settlement on Marriage with the Sanction of the Court under the Infants' Settlement Act (18 & 19 Vict. c. 43) of the Wife's Reversionary Interest to which she is entitled in the Personal Estate of a Testator. Variations in brackets where the Wife is a Ward of Court, and the Estate is being Administered by the Court 605

XIV. Settlement on Marriage of Stocks, &c., belonging to the tended Husband, and of a [illegible]nging to the Intended Wife (an Infant); The [illegible]st of the Wife in the Property Settled by the Husband being made conditional on her confirmation of the Settlement when she comes of age. Covenant by the Husband to Confirm the Settlement. 613

XV. Deed of Confirmation by a Wife on attaining Twenty-one Years, of a Settlement made by her while an Infant 616

XVI. Settlement on the Marriage of a Trader, of Stocks, Shares and Securities belonging to him upon trust for himself for Life, charged with the maintenance of the Wife and Children of the Marriage, and subject thereto upon Trusts for the Benefit of the Wife and Children. Power for Trustees

SETTLEMENTS—*continued.*

PAGE

to lend the Trust Funds to the Husband for the purposes of his Business 617

XVII. Settlement on Marriage of Stock-in-trade, Credits, and Furniture belonging to the Intended Wife, for the Benefit of Herself and her Children already born and to be born, with Provision for carrying on the Trade..... 620

XVIII. Settlement on Marriage of a Widow under a Power to withdraw part of the Trust Funds contained in her Former Marriage Settlement 622

XIX. Declaration of Trust on Marriage of a Widow of Trust Funds Settled on her former Marriage, for the purpose of Restraining Alienation during the Intended Coverture..... 626

XX. Settlement on Marriage of a Sum of Money belonging to the Husband, and of Stocks, &c., belonging to the Wife. The First Life Interest in the Husband's Fund is given to the Wife; and the First Life Interest (terminable on Bankruptcy, &c.) in the Wife's Fund is given to the Husband. Covenant by the Husband for Payments to the Trustees of certain sums in respect of any After-acquired Property derived from a Particular Source 627

XXI. Articles for a Marriage Settlement of Personal Property belonging to the Intended Husband and Wife respectively 632

XXXII. Post-nuptial Settlement (pursuant to Articles entered into on a Marriage between an Englishwoman and a Foreigner) of Personalty belonging partly to the Husband and partly to the Wife. Nomination of New Trustees. Declaration that the Settlement shall be construed and administered according to the Law of England 635

XXIII. Post-Nuptial Settlement of Stock in the Funds and a Mortgage Debt (transferred by a Separate Deed) in Trust for the Settlor's Wife, during her Life and after her Death for the Settlor during his Life, and after the Death of the Survivor for Children (all daughters) in Aliquot Shares, for their Separate and Inalienable Use for Life, with an Ulterior Trust for their Respective Children, or more Remote Issue 639

XXIV. Voluntary Settlement for the Benefit of an Improvident Relative and his Wife and Children. Special Provisions giving the Trustees a Wide Discretion as to the Application of the Trust Funds. Power for Trustees to Determine the Trust 643

XXV. Deed of Arrangement by way of Voluntary Settlement of Funds derived under a Previous Settlement and Other Instruments, for the purpose of Saving Female Beneficiaries from Loss arising from Depreciated Investments of Some of the Funds, and Making Provision for Children of the Settlors 648

XXVI. Declaration of Trust (by Supplemental Deed) of Stocks, &c., added to Trust Funds comprised in a Settlement 654

SETTLEMENTS—*continued.* PAGE

XXVII. Memorandum (to be endorsed on a Settlement) of the Addition of a Sum of Stock to the Trust Funds..... 655

XXVIII. Settlement on Marriage (by One Deed) of Freehold, Copyhold, and Leasehold Estates, and Personalty, upon Trust for Sale, where Part of the Settled Property belongs to the Intended Husband, and Part to the Intended Wife. Power for Husband and Wife respectively by Will to Direct, on Default of Issue, that a Sum shall be Raised out of their respective Trust Properties, and applied as directed 656

XXIX. Conveyance of Freeholds in Trust for Sale: the Proceeds of Sale to be held upon Trusts Declared by a Deed of Even Date. Powers of Leasing, &c. 661

XXX. Declaration of Trusts of Money to Arise from the Sale of Freeholds Conveyed by Deed of Even Date for the Benefit of the Intended Husband and Wife and the Issue of the Marriage: Covenant to Settle After-acquired Property of the Wife 664

XXXI. Conveyance on Marriage of an Equitable Undivided Share of Freeholds in Remainder Expectant on the Determination of a Life-Estate to Trustees upon Trust for Sale. Power of Partition, and to Raise Equality Monies by Mortgage. Proviso as to Costs of Assurances, &c. 667

XXXII. Settlement on Marriage of a Reversionary Interest of the Husband under a Prior Settlement and Appointment, and of the Proceeds of Sale of an Equitable Reversionary Interest of the Wife Conveyed by Deed of Even Date. Covenant by Wife's Father to Pay an Annuity during his Life 671

XXXIII. Conveyance on Marriage of Freeholds, Copyholds and Leaseholds belonging to the Intended Husband upon Trust for Sale: Power to Sell for Fee Farm Rents. Extensive Powers of Partition, Exchange, Enfranchisement, Management, Leasing, &c. 675

XXXIV. Surrender by Husband of Copyholds, Pursuant to a Covenant in his Marriage Settlement, to the Use of the Trustees of the Settlement 686

XXXV. Settlement on Marriage of Freeholds and Copyholds belonging to the Intended Husband: Limitation of Rentcharge by Way of Pin-Money for the Intended Wife; and Subject thereto of Lands to the Use of the Husband for Life, with Remainder to the Use that the Wife may Receive a Jointure, and Subject thereto to Trustees for 500 Years to Secure Portions for Younger Children, with Remainder to the Use of the First and Other Sons of the Marriage Successively in Tail Male, Remainder to the Husband in Fee. Trusts of Term for Securing Portions: Powers of Jointuring and Charging Portions. Trusts of Copyholds to

SETTLEMENTS—*continued.* PAGE

Correspond with Uses of Freeholds. Settlement of Chattels as Heirlooms 688

XXXVI. Settlement on Marriage of Freeholds and of a Leasehold House in Town belonging to the Intended Wife. Limitation of Lands to Trustees for a Term of 99 Years during the Intended Husband's Life, to Secure a Rentcharge to the Wife and Subject thereto to the Husband for Life, with Remainder to the Use of the Wife for Life, with Remainder to Trustees to Secure Portions, with Remainder to the Use of the First and Other Sons in Tail Male and in Tail with Remainder to the Use of the Daughters as Tenants in Common in Tail with Cross-Remainders, Remainder to the Wife in Fee. Trusts of Terms for Securing Rentcharge and Portions. Provisions Extending the Powers and Provisions of the Settled Land Acts. Trusts of Leaseholds to Correspond with Uses of Freeholds 699

XXXVII. Resettlement of Freeholds by a Father and Eldest Son on the Marriage of the Latter. Limitation of a Rentcharge to the Intended Husband, and of Jointure Rentcharges to the Intended Wife, Subject thereto to the Father for Life, Remainder to the Intended Husband for Life, Remainder (Subject to a Term for Securing Portions) to his First and Other Sons in Tail Male, with Remainders, Comprising Limitations to the Husband's Younger Brothers for Life and their Respective Issue in Tail Male, with Similar Limitations in Tail. Name and Arms Clause. Shifting Clause Carrying over Settled Lands on Accession to Title and Family Estates. Powers of Jointuring and Charging Portions. Appointment of Monies, &c., to Follow Uses of Freeholds 712

XXXVIII. Family Resettlement by a Father and Eldest Son of Freeholds and Leaseholds, Held under Several Leases, Comprising Mining Property, Subject to Portions raisable under a Will which Created the Original Settlement, and Settlement of Freeholds subject to Mortgages, and of Mining Plant, &c., belonging to the Father. Release by Father's Wife of Jointure Charged under a Power in the Will. Limitations of Freeholds to Uses giving the Father Power to Charge Estates with a Sum for his Own Benefit to Recoup Advances made to the Son, and Subject thereto to Provide Rentcharges for the Son, varying in Different Events, and Subject thereto to Uses in Strict Settlement Restoring the Father's Powers under the Will, but Giving an Increased Jointure Rentcharge to his Wife. Extension of Statutory Powers of Tenant for Life, &c., as regards Mining Property. Assignment of Leaseholds upon Trusts to Correspond with Uses of Settled Freeholds. Assignment and Declaration of Trusts of Mining Plant, &c. Release of Monies Advanced to Son 730

XXXIX. Family Resettlement by Father and Only Son of Free-

SETTLEMENTS—*continued.* PAGE

hold Hereditaments comprising an Advowson, subject in Common with other Hereditaments (the Absolute Property of the Father) to Annuities and Incumbrances. Limitation of Hereditaments, other than Advowsons, to the Father and Son Successively for their Lives, with Remainder to the Male Issue of the Son as he shall Appoint, and in Default of Appointment to his Sons Successively in Tail, with Ultimate Remainder to the Son in Fee-Simple: Limitation of Advowson to such Uses as Father and Son shall Jointly Appoint, and Subject thereto, to Trustees upon Trust to Present Nominee of Son, and to Sell, and to Hold Proceeds of Sale upon Trust to Re-invest in Land to be Held upon the uses Limited of the other Settled Hereditaments. Apportionment of Annuities and Incumbrances between the Settled and other Hereditaments Charged therewith 754

XL. Settlement on Marriage by a Tenant for Life in Possession of Estates Settled in Strict Settlement Charging his Life Estate with Pin-Money in Favour of the Intended Wife, and Exercising his Power of Charging a Jointure for her, and Portions for Younger Children. Power for Husband to admit the Children of a Subsequent Marriage to Share in the Sum Provided for Portions 762

XLI. Settlement on Marriage of Freeholds to Uses and of Leaseholds in Trust for the Husband and Wife Successively for Life, with Remainder to the Issue of the Marriage as the Husband and Wife, or the Survivor shall Appoint; and in Default of Appointment to the Children in Equal Shares in Tail as Tenants in Common, with Cross-remainders. (A Concise Form.) 767

XLII. Marriage Settlement of a Reversionary Share of Freeholds on Wife for Life, Remainder to Children of Marriage as Tenants in Common in Tail, with Cross-remainders, Remainder to Wife's Sister and her Children (Variation when the Limitations are in defeasible Fee-Simple). Advancement Clause. Covenant to Settle other Property to same Uses. Assignment of Renewable Leaseholds on Corresponding Trusts. Settlement of Shares in Mines and Residue, and a Sum Secured by Bond on Trusts for Conversion, and usual Trusts for Husband, Wife and Children. Proviso for Separation of Funds in certain Events: Power to Postpone Conversion 769

XLIII. Disentailing Deed of Freeholds by Tenant in Tail in Possession 780

XLIV. Disentailing Deed of Freeholds by Tenant in Tail Male in Possession. (A short Form without Recitals.) 782

XLV. Consent of Protector of a Settlement to Barring an Estate Tail 782

XLVI. Disentailing Deed by Tenant in Tail in Remainder (with the Consent of the Protector, given by a Separate Deed) to

SETTLEMENTS—*continued.*

PAGE

use of Tenant in Tail in Fee-Simple, Subject to the Protector's Life Estate 783

XLVII. Disentailing Deed by Protector and Tenant in Tail of Freeholds and Money to be Laid out in Purchase of Land to be Settled to such Uses as Protector and Tenant in Tail shall Jointly Appoint, and in Default of Appointment to Subsisting uses of Settlement 785

XLVIII. Surrender out of Court of Copyholds by Legal Tenant in Tail in Possession, previously to his Marriage 787

XLIX. Surrender of Copyholds by Equitable Tenant in Tail in Remainder, with Consent of Protector to Bar Entail 788

L. Disentailing Deed by Tenant in Tail in Possession of Equitable Estate in Copyholds 790

LI. Deed by Tenant in Tail in Remainder to Create a Base Fee ... 791

LII. Deed to Enlarge a Base Fee into an Estate in Fee-Simple (to be Endorsed on the Deed Creating a Base Fee) 792

APPENDIX

TO THE FOREGOING DISSERTATION ON SETTLEMENTS.

[Trust Investment Act, 1889, and Observations thereon.]

SPECIAL DEEDS AND OTHER INSTRUMENTS.

PRECEDENTS..... 801–867

I. Agreement for Purchase on the Hire System of Furniture, &c., in an Hotel 803

II. Deed of Arrangement between Executors of a Deceased Person and his Late Partners, for Use of his Name in Carrying on Business 806

III. Assent by an Executor to a Bequest of Leaseholds 808

IV. Deed of Confirmation by an Heir-at-Law of an Estate mentioned to be Devised by Will Unattested 812

V. Declaration of Trusts of a Sum of Consols Invested as a Security or Guarantee for the Secretary of an Hospital or other Institution 816

VI. Declaration of Trust by the Transferee of a Mortgage of Part of the Mortgage Debt in Favour of the Original Mortgagee 818

SETTLEMENTS—*continued.* PAGE

VII. Declaration of Trust of a Lease of Slate Quarries in Favour of a Company. Qualification of a Covenant against Assignment without Licence, so as to Allow Assignment to New Trustees 820

VIII. Statutory Declaration as to Identity, and Uninterrupted Possession of Parcels 822

IX. Statutory Declaration as to Pedigree and other Matters Affecting Land Contracted to be Sold 824

X. Statutory Declaration as to Payment of Testator's Debts, &c., and of no Settlement on a Marriage 826

XI. Forms of Directions and Consent, with Regard to Express and Statutory Trusts and Powers 827

1. Direction or Consent as to Investment of Trust Funds 827

2. Direction by Tenant for Life as to Investment of Capital Monies 827

3. Direction by Widow to Vary Investment 828

4. Consent of Tenant for Life to Alteration of Investment of Capital Monies 828

5. Direction by Tenant for Life for Purchase of Lands to be Settled and Application of Capital Monies in Payment of Purchase Money 829

6. Consent by Trustees of a Settlement to Sale by Tenant for Life of the Principal Mansion House, &c. 830

7. Direction or Consent to the Advancement of a Child 830

8. Direction under a Power Contained in a Will that the Trustees should Convey Part of the Lands Devised, so that an Intended Wife should, in Case the Marriage took Effect and She Survived her Husband and two other Persons, Yearly Receive an Annuity 831

XII. Conveyance by Trustees for Sale of Freeholds to a Beneficiary Absolutely Entitled to Proceeds of Sale who Elects to Take the Property as Realty 833

XIII. Licence by Landowner to Committee of Cricket Club to Erect Pavilion, and Use Ground for Cricket and Lawn-Tennis 835

XIV. Licence to Use an Ornamental Enclosure or Garden in Respect of a Town House Demised by an Indenture of Even Date ... 837

XV. Bye-Laws for the Regulation and Management of a Common 841

XVI. Presentation to a Benefice 848

XVII. Farming Lease by an Incumbent with the Consent of the Patron of the Benefice and of the Bishop of the Diocese, of Lands belonging to the Benefice under the Stat. 5 & 6 Vict. c. 27 849

XVIII. Building Lease by an Incumbent, with the Consent of the Patron of the Benefice and of the Ecclesiastical Commissioners, of Land belonging to the Benefice, under the

SETTLEMENTS—*continued.* PAGE

Ecclesiastical Leasing Acts, 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 27 851

XIX. Revocation of a Voluntary Settlement and Declaration of New Uses or Trusts (by Endorsement on the Settlement) ... 860

XX. Conveyance by Way of Sale of Land to the Trustees of a Society of Protestant Dissenters for the Purposes of a Chapel and School 861

NOTE.—*Mortmain and Charitable Uses Act*, 1888 867

INDEX TO THE DISSERTATIONS AND NOTES 877

INDEX TO THE PRECEDENTS 933

TABLE OF CASES.

A.

PAGE

ACTON *v.* Pierce ..... 200 (n), 201
——— *v.* Woodgate 190, 191
Adames' Trusts, Re ..... 137 (n.)
Adams *v.* Adams 406
——— *v.* Pierce ... 808 (n.), 809 (n.)
Adams' Policy Trusts ..... 138 (n.)
Affleck *v.* Affleck 327
Ainslie *v.* Harcourt 509
——— Re, Ainslie *v.* Ainslie 526
——— Re, Swinburn *v.* Ainslie... 390
Albemarle (Earl of) *v.* Rogers 445 (n.)
Alexander *v.* Alexander 299
——— *v.* Mills 315
Alford, Re 310
Allan, Re 310
Allcard *v.* Skinner 193
Allen *v.* Allen ... 150, 466 (n.), 538, 539 (n.)
——— *v.* Jarvis 351
Allnutt's Trusts, Re 326
Alt *v.* Alt 214
Alton *v.* Harrison 355
Amand *v.* Bradburne 351
Ames, Re 354
Ancona *v.* Waddell 287
Anderson *v.* Abbott ..... 147 (n.)
Andrews *v.* Andrews 155, 170
——— Re, Edwards *v.* Dewar 293
Andrews' Trusts, Re..... 184
Anon. (31 Beav.) 43, 46
——— (Freem. 288) ..... 811 (n.)
——— (Freem. 28, pl. 22 b.) 811 (n.)
——— (4 Russ.) 156
Anson *v.* Potter..... 47, 336
Anstis, Re 325, 326, 327
Appleton *v.* Rowley..... 364, 368
Archer *v.* Hudson..... 48, 380
——— *v.* Kelly 328
Archer's Case..... 373
Arden *v.* Arden..... 19
Argoll *v.* Cherry 28
Armstrong, Re, Ex parte Boyd, 135 (n.), 141, 142 (n.)
——— ——— Gilchrist, 135 (n.)
——— ——— *v.* Armstrong 414
Arnold *v.* Woodhams 292
Arrowsmith, Re..... 496 (n.)
Arthur, Re..... 249
Arton *v.* Booth 31
Ashbee *v.* Pidduck 35
Ashby *v.* Hincks 393
Ashley *v.* Ashley 244
Ashton *v.* Blackshaw 186, 241

PAGE

Ashurst *v.* Mill 379
Astley *v.* Lord Essex 504
Aston *v.* Aston 385
——— *v.* Pye ..... 28 (n.)
Atkinson *v.* Baker..... 361
——— Re, Atkinson *v.* Bruce 442 (n.), 487 (n.), 491 (n.)
Att.-Gen. *v.* Day 534
——— *v.* Heywood 188, 286
——— *v.* Holbrook ..... 808 (n.)
——— *v.* Jones..... 641 (n.)
——— *v.* Shield ..... 689 (n.)
Attree *v.* Hawe ..... 262 (n.), 270
Austen *v.* Halsey 158
Auster *v.* Powell 314
Ayerst *v.* Jenkins 192
Aylesford's (Earl of) Settled Estates, Re..... 444 (n.), 479 (n.)
Ayloffe *v.* Scrimshawe..... 27
Aylwin *v.* Witty 348
Aylwin's Trusts, Re 161

B.

BACON *v.* Camphausen 345
Bacon's Settlement Trusts, Re *Addenda*
Badham *v.* Mee..... 161
Baggett *v.* Meux 294
Bagot *v.* Bagot 389
Bahin *v.* Hughes 141, 345
Bailey *v.* Fermor ..... 7 (n.)
——— *v.* Homan ..... 28 (n.)
——— *v.* Lloyd..... 45
Bain *v.* Cooper 46
Bainbrigge *v.* Blair ..... 353 (n.)
——— *v.* Brown 48, 383
Baker *v.* Bayley..... 538 (n.)
——— *v.* Bradley 379, 380
——— *v.* Sebright..... 393
——— *v.* Simpson..... 102
Balfour *v.* Cooper..... 411, 412
Ball *v.* Coutts 157
——— *v.* Montgomery 251
Ball's Trusts, Re 319
Bankes *v.* Le Despenser ..... 531 (n.)
——— *v.* Small 222, 523, 531 (n.), 534
Bannerman's Estate, Re 402, 689 (n.)
Bantry *v.* Ibson..... 42
Barber, Re, Burgess *v.* Vinicome 352, 353
Barber's Settled Estate, Re... 539 (n.)
Barford *v.* Stuckey 33
Barker *v.* Richardson 42

PAGE

Barker *v.* St. Quentin 28
Barkworth *v.* Young..... 205
Barrack *v.* McCulloch..... 385
Barrow *v.* Barrow..... 149
——— *v.* Gray..... 38
Bartram *v.* Whichcote..... 678 (n.)
Bassett *v.* Nosworthy 165
Bastard *v.* Stukeley ..... 809 (n.)
Bateman *v.* Ross 97, 98
Bathurst *v.* Errington 407
——— *v.* Murray 156
Battersbee *v.* Farrington 205
Bayley *v.* Lloyd..... 31
Baylis *v.* Usher 28
Baynton *v.* Collins ..... 137 (n.)
Bayspoole *v.* Collins..... 165, 174
Bazeley *v.* Forder..... 102
Beall *v.* Smith ..... 496 (n.)
Beatniff *v.* Smith 16
Beaumont *v.* Marquis of Salisbury 403
Beaumont's Settled Estate, Re, 480 (n.)
Beavan *v.* Earl of Oxford 169
Beck, Re, Re Cartington Estate 463 (n.), 481 (n.)
Beckett *v.* Tasker ... 135 (n.), 143 (n.)
Bedford (Duke of) *v.* Abercorn (Marquis of) 206
——— *v.* Backhouse..... 17
Bedford's (Earl of) Case..... 813 (n.)
Belcher and Hudson's Case..... 39
Belchier, Ex parte 272
Bell *v.* Holtby ..... 525 (n.), 529
Bellamy and Met. Board of Works, Re..... 336
——— *v.* Sabine..... 381
Bellasis *v.* Uthwatt 426
Bengough *v.* Walker..... 426, 427
Benham *v.* Keene..... 8 (n.), 17
——— *v.* Griffiths..... 95
Bennett *v.* Bennett 503
——— *v.* Biddles 157
——— *v.* Cooper 181
——— *v.* Gaslight & Coke Co.... 352
——— *v.* Lytton 47
Benson *v.* Scott..... 361
Bentley *v.* Mackay 210, 383
Benyon *v.* Benyon 108
Berens *v.* Fellowes 434
Beresford *v.* Beresford..... 347
Berkeley *v.* Hardy 33
Besant, Re..... 110, 111
——— *v.* Wood 91, 98, 100
Bethell *v.* Abraham 280
Biddles *v.* Jackson 157
Biggs *v.* Peacock 224
Bill *v.* Cureton 167, 190, 255
Billson *v.* Crofts 290
Bindley *v.* Mullonev 96
Bird *v.* Bird 317
Bishop, Ex parte, Re Tonnies ... 183, 184
Blackburn *v.* Stables 198
Blackwood *v.* Borrowes 35, 38
Blades *v.* Blades 16, 18
Blake, Ex parte..... 328

PAGE

Blake, Re, Jones *v.* Blake 226
Blake's Case 28
Bland *v.* Dawes..... 290
Blewitt, Re..... 525 (n.)
Blockley *v.* Blockley 313
Blood *v.* Branfill 144
Blundell *v.* De Fable 318
Boddam, Ex parte 285
Bold *v.* Hutchinson..... 208, 213
Bolland, Ex parte, Re Clint 184, 321
Bolles *v.* Nyseham ..... 808 (n.)
Bolton *v.* London School Board 384, 862 (n.)
Bond *v.* Taylor 96
——— *v.* Walford 254
Bonfield *v.* Hassall 290
Booth *v.* Smith 403
Bosville *v.* Bosville & Craven..... 317
Bower *v.* Smith 327, 332
——— *v.* Swadlin..... 31, 34
Bowles *v.* Smart 44
Bown, Re, Halloran *v.* King 30 (n.), 295
Boxall *v.* Boxall 215
Boycot *v.* Boycot 412
Boyd *v.* Boyd..... 313, 314
Boyd's Settled Estate, Re ... 259 (n.), 265
Brackenbury *v.* Gibbons..... 400
Bradford *v.* Brownjohn 505, 509
——— *v.* Romney 209, 210, 211
Bradley, Re, Brown *v.* Cottrell ... 320
Brandon *v.* Robinson 285
Braybroke *v.* Inskip..... 45
Braybrooke *v.* Att.-Gen. ..... 717 (n.)
Brayzier *v.* Hudson ..... 811 (n.)
Breadalbane (Marquis of) *v.* Marquis of Chandos..... 209
Briant, Re, Poulter *v.* Shackell ... 215
Brice *v.* Stokes ..... 366 (n.)
Bridge *v.* Brown ..... 467 (n.)
Brier, Re, Brier *v.* Evison 273
Brigstocke *v.* Brigstocke..... 445 (n.), 455 (n.)
Broadwater Estate, Re... 468 (n.), 472
Broadwood's Settled Estate, Re 462 (n.), 536
Broderick *v.* Broderick..... 43
Brome *v.* Berkeley 412
Brook *v.* Brook 166
Brooke *v.* Brooke ..... 139 (n.)
——— *v.* Pearson 285
Brooks, Ex parte ..... 803 (n.)
——— *v.* Nash..... 28 (n.)
——— *v.* Stuart 28, 34, 47
Brophy *v.* Bellamy 308
Broughton *v.* Broughton..... 352, 354
Broun *v.* Kennedy 193
Brown, Re ..... 351, 480 (n.)
——— *v.* Brown ... 100, 101, 147 (n.)
——— *v.* Burdett..... 351
——— *v.* Peek 95
——— *v.* Raindle..... 361
Brown's Will, Re ..... 455 (n.)
——————— and Settlement ... 303

PAGE
Brydges *v.* Stephens 389
Bubb *v.* Yelverton 388
Buckle *v.* Mitchell 168
Buckley's Trusts, Re 306
Buckmaster *v.* Buckmaster ... 144, 149, 155, 158
Bucks (Earl of) *v.* Drury, 146, 146 (n.)
Buckworth *v.* Thirkle 371
Budge *v.* Gummow 271, 273, 276
Bulkeley *v.* Stevens 281
Bullock *v.* Sadlier 165
Bulmer *v.* Hunter 177
Bulwer Lytton's Will, Re 469 (n.), 472
Bunker *v.* Cook ..... 810 (n.)
Burgess *v.* Vinicome ..... 352, 353 (n.)
Burgh *v.* Preston 27
Burnaby *v.* Eq. and Revy. Trust Society 150
Burnaby's Settled Estates, Re *Addenda*
Burridge *v.* Row 348
Burroughes *v.* Holley ..... 8 (n.)
Burton *v.* Sturgeon 316
Bushell *v.* Beavan 32
——— *v.* Bushell 16
Buster, Re 215
Butcher *v.* Butcher, 28, 46, 324, 325, 329
Bute (Marquis of), Re, Marquis of Bute *v.* Ryder 410
Butler *v.* Butler ... 133 (n.), 139 (n.), 367
Byron's Charity, Re ..... 476 (n.)

C.

C.'s Settlement, Re 298
Cadman *v.* Cadman 311
Caffrey *v.* Darby 350
Cahill *v.* Cahill 92, 106, 147
Callagan *v.* Callagan 165
Camden (Marq. of) *v.* Murray ..... 227, 442 (n.)
Cameron and Wells, Re 171, 172 (n.), 174
Campbell *v.* Allgood 392
——— *v.* Bainbridge 325
——— *v.* Ingilby 150, 166
——— *v.* Leach 453
Campbell's Policies, Re 329
Cann *v.* Cann 44
—— *v.* Wilson 277
Cannel *v.* Buckle ... 146, 200 (n.), 201
Cardigan *v.* Curzon-Howe ... 448 (n.), 449 (n.), 488 (n.), and *Addenda*
Cardross' Settlement, Re 154
Carlton *v.* Earl of Dorset 251
Carnac's Will, Re, Sir J. ... 444 (n.), 479 (n.), 480 (n.)
Carpenter *v.* Heriot 380
Carr, Re 452
—— *v.* Benson ..... 446 (n.)
—— *v.* Living ..... 619 (n.)
Carter, Ex parte 41
——— *v.* Carter 328
Carthage *v.* Manby 39

PAGE
Cartwright *v.* Cartwright, 96, 96 (n.), 97
Caruthers *v.* Caruthers ... 144 (n.), 146
Carwardine *v.* Carwardine 400
Carwell *v.* Edwards 27
Casborne *v.* Scarfe 362
Castlemain (Lord) *v.* Lord Craven 396
Cater's Trusts, Re 47, 49
Caton *v.* Caton 202, 204, 213
——— *v.* Rideout 296
Cator *v.* Cooley 17, 18
Catt's Trusts, Re ..... 499 (n.)
Cave *v.* Cave 157, 243
Cavell *v.* Prince 166
Cecil *v.* Langdon 342, 343, 452
Chadwick *v.* Dolman 404
——— *v.* Heatley 47
——— *v.* Turner ..... 6 (n.), 15
Chalmers *v.* North 320
Chamberlain *v.* Chamberlain 811 (n.)
——— *v.* Napier 163, 303
Chambers *v.* Crabbe 251
——— *v.* Caulfield 97
Chandos *v.* Brownlow 18
——— (Duke of) *v.* Talbot 388
Chapman *v.* Bradley 166, 255
Chapple, Re, Newton *v.* Chapple, 354, 355
Charik, Re ..... *Addenda*
Charlesworth *v.* Holt 108
Chatham *v.* Wilkinson 446
Chave *v.* Farrant 426
Chaytor's Settled Estates Act, Re 459, 467 (n.), 490 (n.)
Chennell, Re, Jones *v.* Chennell 265, 266
Cheshunt College, Re ..... 461 (n.)
Chesterfield (Earl of) *v.* Janssen 44
Chesterfield's Trusts, Re 282
Cheval *v.* Nichols 16
Chichester (Lord) *v.* Lord Coventry 418, 419, 421, 424, 428
Chilliner *v.* Chilliner 205
Cholmeley *v.* Paxton 391
Chomondeley, Re ..... 641 (n.)
——— (Marq. of) *v.* Lord Clinton 436
Christian *v.* Whitaker 141, 333
Christie *v.* Gosling 511
Christmas, Re, Martin *v.* Laycon 269
Chudleigh's Case 373
Church *v.* Edwards 527
Cigala's Settlement Trusts, Re ... 163
Clack *v.* Holland 347, 348, 349
Clark *v.* Clark 104
——— *v.* Colls 318
——— *v.* Girdwood ..... 209 (n.)
Clarke, Re 180, 181, 282, 321
——— *v.* Chamberlain 529
——— *v.* Hayne ..... *Addenda*
——— *v.* Thornton ... 443, 443 (n.), 461, 467, 467 (n.), 491 (n.) 493 (n.)
——— *v.* Wright 172, 173
Clay & Tetley, Re 357
Clayton *v.* Earl of Wilton 172
Clegg *v.* Rowland 453

PAGE
Clements *v.* Scudamore ..... 369 (n.)
Clergy Orphan Corporation, Re 257, 283
Clifford *v.* Clifford 108
——— *v.* Laton 101
Clifton *v.* Cockburn 44
Clinton's Trusts, Re 323, 328
Clitheroe Estate, Re ... 441 (n.), 488, 490 (n.), 491 (n.), 493 (n.)
Clive *v.* Carew ..... 30 (n.), 292, 346
Clough *v.* Clough 146
——— *v.* Lambert 93, 104
Coates to Parsons, Re 342, 343
Cock *v.* Cock 100
Cockburn *v.* Peel 280, 281
Cockerell *v.* Cholmeley 391
——— *v.* Essex (Earl of) 516
Cocks *v.* Nash 35
Codrington *v.* Codrington 147
——— *v.* Foley (Lord) 412
——— *v.* Lindsay 147, 205
Coffin *v.* Coffin 392
Cogan *v.* Duffield... 196, 196 (n.), 197, 199, 207
Cole *v.* Gibson 43, 44
Colebourne *v.* Mixstone ..... 812 (n.)
Coles, Ex parte, Re Rucker..... 2
——— *v.* Courtier ..... 350, 398 (n.)
——— *v.* Pilkington 204
Collett *v.* Morrison 245
Collinge's Settled Estate, Re, 442 (n.), 457 (n.)
Collingwood *v.* Stanhope ... 404, 405, 407, 499
Collins *v.* Collins 107, 310
Collis *v.* Hector 162
Collyer *v.* Isaacs.....183 (n.)
Colonial Bank *v.* Whinney ...133 (n.), 142
Columbine *v.* Penhall 177
Colyear *v.* Mulgrave..... 33
Conolan *v.* Leyland .....114 (n.), 135
Const *v.* Harris .....808 (n.)
Constable *v.* Constable ...443 (n.), 490 (n.)
Consterdine *v.* Consterdine..... 270
Conway *v.* Fenton 396
Cook *v.* Addison 27
——— *v.* Fearn 208
Cooke *v.* Cholmondeley.....445 (n.)
Cooker *v.* Child..... 32
Cookes *v.* Cookes ...463 (n.), 464 (n.), 519 (n.)
Cooper, Re, Cooper *v.* Slight 315
——— *v.* Cooper 415, 426
——— *v.* Macdonald ...295, 364, 369, 522 (n.), 523
——— *v.* Phibbs 43
——— *v.* Robinson 40
——— *v.* Wormald 203
——— and Allen's Contract, Re 226
Coppin *v.* Coppin .....811 (n.)
Cordwent *v.* Hunt.....28 (n.)
Cork *v.* Baker 201
Corley *v.* Stafford (Lord) .....209 (n.)
Cormick *v.* Trapand..... 166
PAGE
Cornish *v.* Clark 165
Cornmell *v.* Keith 331, 332
Cornwallis *v.* Wykeham-Martin 503, 536
Corrance *v.* Corrance 317
Corsellis, Re 352, 353
Cory *v.* Cory 380
Cottle *v.* Warrington ..... 8 (n.)
Cottrell *v.* Cottrell.....478 (n.)
Courtier, Re, Coles *v.* Courtier ... 397
Courtney *v.* Ferrers 245
Coutts *v.* Ackworth 192
Coverdale *v.* Eastwood 214
Cowley (Earl) *v.* Wellesley ..... 389, 445 (n.), 475 (n.)
Cowper *v.* Green 38
Cowx *v.* Foster 93
Cox, Ex parte 186
—— *v.* Bennett..... 157
Crabb *v.* Crabb 99
Craddock, Re..... 215
Cradock *v.* Piper, 352, 353, 353 (n.), 354
Cragoe *v.* Jones..... 38
Craib *v.* D'Aeth..... 31
Craven *v.* Brady 290
Crawcour, Ex parte 803 (n.), 805 (n.)
——— *v.* Salter.....803 (n.)
Cresswell, Re, Parkin *v.* Cresswell 512
Crook *v.* Stephens..... 42
Crosby *v.* Church 346
Cross' Charity, Re..... 451
Crossley *v.* Elworthy 178
Crossman *v.* The Queen 187
Crouch *v.* Waller 99, 108
Croughton's Trusts, Re..... 295
Cuming, Re 235
Cunningham *v.* Moody..... 368
Currey, Re 326
Cust *v.* Middleton .....453 (n.)

D.

DADHEMAR (Viscountess) *v.* Bertrand..... 519
Daking *v.* Whimper 168
Dalrymple *v.* Hall 318
Dalton, Re 154
Daly *v.* Beckett..... 453
Dance *v.* Goldingham..... 226
D'Angibau, Re, Andrews *v.* Andrews 155, 172, 176, 190, 608 (n.)
Darkin *v.* Darkin 296
Darthez *v.* Lee 43
Dashwood *v.* Jermyn 212
David, Re, Buckley *v.* Royal National Life-boat Society..... 868
Davies *v.* Davies.....150, 211, 396
——— *v.* Hodgson .....30 (n.)
——— *v.* Spurling 43
Davis, Re, Ex parte Rawlings, 803 (n.)
——— *v.* Davis.....811 (n.)
——— *v.* Marlborough (Duke of)... 492 (n.)
——— *v.* Prout.....139 (n.)
——— *v.* Strathmore (Earl of) ... 16
——— *v.* Tollemache..... 222

PAGE
Dawes, Ex parte, Re Moon ...253, 289
——— *v.* Creyke 330
——— *v.* Tredwell...253, 322, 323, 324
Dawson, Re 182
——— *v.* Oliver-Murray 303
Day *v.* Day..... 150
—— *v.* Woolwich Equitable Building Society .....336 (n.)
Dean, Re 873
—— *v.* Brown 241
—— *v.* Newhall 35
De Beauvoir *v.* De Beauvoir 433
De Beil *v.* Thompson 205, 212, 213, 214
Debeze *v.* Mann..... 419
De Grey *v.* Richardson 363
De la Warr's Estates, Re .....479 (n.)
Dempster *v.* Dempster..... 317
Dennis *v.* Payn 34
Dennys *v.* Sargeant 102
Dent *v.* Dent .....397, 467 (n.)
Derbyshire *v.* Home .....30 (n.)
De Ros' Trust, Re 253, 323
De Stackpoole *v.* De Stackpoole,151, 156
D'Estampes' Settlement, Re...324, 325, 331
De Tastet *v.* Le Tavernier 290
Detmold, Re, Detmold *v.* Detmold 285
Deux *v.* Devereux..... 27
—— *v.* Jefferies 27
Devall *v.* Dickins .....141 (n.)
Devon (Duke of) *v.* Atkins ...811 (n.)
D'Eyncourt *v.* Gregory ...480 (n.), 500
Dicconson *v.* Talbot .....488 (n.)
Dickinson, Re .....519 (n.)
——— *v.* Dickinson 413
——— *v.* Dillwyn 328
Dickson, Re.....305, 306
——— *v.* Graham .....461 (n.)
Dillon *v.* Parker.....327 (n.)
Dimsdale *v.* Dimsdale ...380, 381, 383
Dixon, Re, Byram *v.* Tull... *Addenda*
—— *v.* Dixon..... 296
—— *v.* Hurrell 102
—— *v.* Terry 41
Doble, Ex parte..... 169
Dod *v.* Dod 199, 432
Dodson *v.* Hay 368
Doe *v.* Allen 485
— *v.* Allsop..... 17
— *v.* Bottriell..... 169
— *v.* Bousfield .....455 (n.)
— *v.* Brewer 31
— *v.* Brightwen 369
— *v.* Butcher ..... 813 (n.)
— *v.* Collinge .....857 (n.)
— *v.* Eyre 288
— *v.* Guy .....809 (n.)
— *v.* Hogg.....3 (n.)
— *v.* James..... 165
— *v.* Jenkins ..... 813 (n.)
— *v.* Redfern 868
— *v.* Rivers..... 370
— *v.* Rusham 168
— *v.* Sturges.....809 (n.)
— *v.* Walls .....813 (n.)
— *v.* White..... 32
PAGE
Dommett *v.* Bedford 287
Domvile *v.* Winnington 406
Dormay *v.* Borrodaile 249
Douglas, Re 873
——— *v.* Congreve 324
——— *v.* Willes..... 428
Downe *v.* Fletcher .....134 (n.)
Downs *v.* Jennings 251
Downshire (Marquis of) *v.* Sandys (Lady) 388, 393, 403
Dowse *v.* Jeffreys 27
Drake *v.* Trefusis 397
Draycott *v.* Harrison.....135 (n.), 293
Drew *v.* Nunn 158
Drosier *v.* Brereton 267
Druitt *v.* Seaward..... 320
Drury Lowe's Marriage Settlement, Re..... 314
Drury's Case 40
Dudley (Countess of), Re.....438, 463 (n.), 494 (n.)
Dudson's Contract, Re...523, 525, 526, 528 (n.)
Duke *v.* Doidge..... 404
Dundas *v.* Dutens..... 205
Dunn *v.* Flood 226
Dunne *v.* Dunne 504
Durant *v.* Titley 96, 97
Durham (Earl) *v.* Wharton 423
Durnford *v.* Lane 145, 146
Dutton *v.* Thompson 193, 194

E.

Eager *v.* Furnival 263, 265
Earl *v.* Ferris .....139 (n.)
Earl and Webster's Contract, Re 440
Eastland *v.* Burchell 102
Eaton *v.* Bennett 209
Eaves *v.* Hickson 43
Eden *v.* Smyth .....28 (n.)
Edwards, Re ..... 328, 496 (n.)
——— *v.* Bingham 208
——— *v.* Broughton 240
——— *v.* Lloyd ..... 459 (n.)
——— *v.* Meyrick 44
Egerton *v.* Brownlow (Earl of)... 516
Eisdell *v.* Hammersley..... 315
Elias *v.* Snowden Slate Quarries Co. 387, 394
Elliott *v.* Davenport..... 808 (n.)
——— *v.* Ince 159
Ellis's Trusts, Re 294, 295
Ellison, Re..... 519 (n.)
——— *v.* Ellison..... 190
——— *v.* Thomas..... 405
Elwes *v.* Elwes..... 209
Emes *v.* Widdowson..... 27
Emmett *v.* Norton 102
Emmins *v.* Bradford 318
Emperor *v.* Rolfe ..... 407 (n.)
England *v.* Downs ..... 620 (n.)
——— *v.* Tredegar (Lord) 47
Esdaile, Re..... 444 (n.)
Essery *v.* Cowlard..... 254

PAGE
Essex *v.* Baugh ..... 2 (n.), 16
Este *v.* Smyth 162, 166
Evans *v.* Carrington 93, 99, 100, 101, 108
——— *v.* Edmonds..... 99, 100
Evelyn *v.* Evelyn 412
——— *v.* Templar 168
Everard *v.* Herne 34
Everitt *v.* Everitt..... 192
Evershed *v.* Evershed 110, 111
Ewart *v.* Ewart..... 327
Ewer *v.* Astrike..... 368
Exmouth (Viscount) *v.* Praed, 512, 516
Eyre, Ex parte 380
——— Re ..... 58 (n.)
Eyston, Ex parte, Re Throckmorton 288
Eyton's Estate, Re, Eyton *v.* Jones ..... 463 (n.)

F.

FAIRLEY *v.* Tuck..... 360
Falcke *v.* Scottish Imperial Insurance Society..... 349
Fane *v.* Fane..... 379
Farewell *v.* Coker..... 43
Farnell, Re..... 746 (n.)
Farrer and Champion, Re ... 503 (n.)
Fazakerley *v.* Ford ..... 500, 721 (n.)
Fearon *v.* Aylesford (Earl of) ... 106, 108
Fenton *v.* Clegg..... 811 (n.)
Feoffees of Heriot's Hospital *v.* Ross..... 350, 520
Festing *v.* Allen 399
——— *v.* Taylor ..... 402, 689 (n.)
Field *v.* Brown..... ... 156
——— *v.* Moore, 144, 145, 147, 150, 158
Fillingham *v.* Bromley 504
Finch, Re, Abbis *v.* Burney... 399 (n.)
——— *v.* Throgmorton ..... 813 (n.)
Fisher *v.* Shirley..... *Addenda*
Fitzer *v.* Fitzer 93, 362
Fitzgerald, Re, Fitzgerald *v.* White 192
——— *v.* Chapman..... 316
——— *v.* Field 408
——— *v.* Fitzgerald... 29, 200 (n.)
Flanders *v.* Clark ..... 810 (n.)
Fletcher *v.* Fletcher..... 91, 98
Flood's Trust, Re 298
Flower, Re..... 336
——— *v.* Flower 106
——— *v.* Martin ..... 28 (n.)
Floyer *v.* Bankes ..... 397, 689 (n.)
——— *v.* Bostock..... 272
Foley *v.* Burnell ... 466 (n.), 511, 514 (n.), 517, 809 (n.), 811 (n.)
——— *v.* Hill..... 44
Foligno's Mortgage, Re 47
Folkes *v.* Western 415
Follet *v.* Tyer 364
Forbes *v.* Deniston 16
——— *v.* Ross 280
Ford *v.* Stewart..... 174
Ford *v.* Tynte 388, 416
——— *v.* White 17
Ford's Case ..... 813 (n.)
Fordyce *v.* Bridges 304
Fortune's Trusts, Re 49
Foss *v.* Foss 386
Foster *v.* Lennard..... 388
——— and Lister, Re 175
Fowkes *v.* Pascoe 419, 429, 430
Fowler, Re, Fowler *v.* Odell... 350, 398
——— *v.* Fowler 210, 241
Frampton *v.* Frampton ... 92, 93 (n.), 98
Fraser *v.* Thompson 166, 177
Freeman *v.* Pope 178
——— *v.* Whitehead 281
Freke *v.* Calmady..... 396
Frewen, Re, Frewen *v.* James... 459 (n.)
Fry *v.* Noble 360
——— *v.* Tapson 271, 272, 273, 275, 276, 344
Fuller *v.* Knight 266, 345
Furnival *v.* Weston 31
Fyfe *v.* Arbuthnot 321

G.

GAITSKELL, Re..... 496 (n.)
Gale *v.* Gale 170, 173
Gandy *v.* Gandy..... 91, 100, 107, 108
Garder *v.* Lachlan..... 33
Gardiner, Re 331
Gardner *v.* London, Chatham, and Dover Rail. Co..... 270
——— *v.* Rowe 241
Garland, Ex parte..... 240
Garnett, Re, Gandy *v.* Macauley.. 43
——— Orme and Hargreave's Contract ..... 443 (n.), 519 (n.)
Garrard *v.* Lauderdale (Lord) ... 190, 191
Garth *v.* Cotton..... 393, 388
Gawden *v.* Draper..... 99
Geaves, Ex parte ..... 549 (n.)
Gee *v.* Spencer 43
George, Re..... 306
Gerard (Lord), Re 332
Ghost's Trusts, Re 46, 49
Gibbons *v.* Snape 524
Gibbs *v.* Harding..... 92, 94, 111
Gibson *v.* Way 295, 298
——— *v.* Wells..... 395
——— *v.* Winter 31
Gilbert *v.* Wetherell ..... 28 (n.)
Gilbey *v.* Copley 32
Gilchrist, Ex parte...135 (n.), 136 (n.), 620 (n.)
——— *v.* Herbert..... 214
Gill *v.* Downing 348
Gillespie *v.* Alexander ... 47, 811 (n.)
Gillibrand *v.* Goold 413
Gisborne *v.* Gisborne 308
Gladholme *v.* Rountree 31

PAGE
Glanvill, Re 292, 293, 297, 347
Gleadhow *v.* Leetham 402
Glenny and Hartley, Re 342
Glenorchy (Lord) *v.* Bosville 198, 432, 515
Glover *v.* Bates ..... 146 (n.)
Godfrey *v.* Faulkner 273
Godwin *v.* Winsmore 361
Goldicutt *v.* Townsend ... 202, 205, 214
Good *v.* Cheesman 27
Goodenough *v.* Goodenough 371
Goodtitle *v.* Billington 400
Gordon *v.* Gordon 44, 379
Gorst *v.* Lowndes 41
Gosling *v.* Gosling 511
Gossett's Settlement, Re 311
Gowan *v.* Gowan 197, 542
Graham, Re ..... 497 (n.)
Graysbrook *v.* Fox ..... 811 (n.)
Green *v.* Ekins 517
——— *v.* Green ..... 147 (n.)
——— *v.* Jenkins ..... 849 (n.)
——— *v.* Paterson ... 170, 176, 523, 524
Greene *v.* Cole 395
Greenville Estate, Re ..... 463 (n.)
Gregg *v.* Coates 396
Gregson, Re 156
Gresley *v.* Moulsey 43
Grey *v.* Mannock ..... 538 (n.)
Grey's Settlement, Re 295
Grier *v.* Grier 199
Griffiths *v.* Gale 299
Grover *v.* Hugell ..... 488 (n.)
Gulliver, Re 202
Guth *v.* Guth 95, 109
Gynn *v.* Gilbard 157

H.

H. *v.* W. 95, 96
Hale & Clark, Re ..... 442 (n.)
Hales *v.* Cox 169
Halford *v.* Kymer 244
Hall, Ex parte 166
——— *v.* Hall 193
——— *v.* Hewer 406
——— *v.* Hill 420
Hall-Dare *v.* Hall-Dare 534
Hallet to Martin ..... 450 (n.)
Hamilton, Re 311
——— *v.* Hector 95, 110, 111
——— *v.* Wright 352
Hammersley *v.* De Biel 201, 203, 214
Hanbury *v.* Litchfield ..... 455 (n.)
Hanbury's Trusts, Re ..... 477 (n.)
Hance *v.* Harding 170, 184
Hancock *v.* Field 39
——— *v.* Hancock ..... 141 (n.), 142 (n.), 333
Hanley *v.* Pearson 208, 209
Hardwicke *v.* Wilmot 325
Harman *v.* Owen 28
——— *v.* Richards 165, 177
Harnett *v.* Maitland 395, 396
PAGE
Harrington *v.* Harrington ... 511, 512, 514, 514 (n.)
Harris *v.* Blakeway ..... 28 (n.)
——— *v.* Goodwyn ..... 28 (n.)
——— *v.* Harris 270
Harris' Settled Estate, Re ... 133 (n.)
Harrison *v.* Cage 201
——— *v.* Harrison ... 134 (n.), 393
——— *v.* Round 500
——— *v.* Symons 433
Harrop's Trusts, Re, 462 (n.), 518 (n.)
Hart *v.* Hart ... 91, 94, 105, 108, 110, 111
——— *v.* Middlehurst ... 199, 204, 432
Hartop *v.* Hartop 380, 381
Harvey *v.* Ashley 145
——— *v.* Cooke 44
——— *v.* Harvey ..... 306 (n.)
Haslinton *v.* Gill 241
Hastings *v.* Orde 147
Haswell *v.* Haswell 161
Hatton *v.* Russell 484
Hawkes *v.* Hubback 294
Hawkshaw *v.* Parkins 27
Hawle *v.* Kirkeby 39
Hay *v.* Palmer ..... 115 (n.)
Haycock's Policy, Re 247
Haymer *v.* Haymer 200
Haynes, Re, Kemp *v.* Haynes, 493 (n.), 505
Hayward *v.* Pile 510
Haywood *v.* Brunswick Benefit Bldg. Soc. 452
Hazle's Settled Estates, Re ... 487, 492
Head *v.* Head 91, 109
Heap *v.* Tonge 171, 379
Hearle *v.* Greenbank 154, 364
Heath *v.* Wickham ..... 30 (n.)
Hebblethwaite *v.* Cartwright 412
Heddey *v.* Wheelhouse ..... 445 (n.)
Henery, Ex parte 27
Hennessey, Re 243
Henry *v.* Armstrong 193
Henty *v.* Wrey 408
Herbert *v.* Herbert ..... 385, 447 (n.)
——— *v.* Pigott 42
Herne *v.* Benbow 395
Heron *v.* Heron 380, 382
Hetherington *v.* Graham 362
Hewison *v.* Negus 93, 175
Heywood *v.* Heywood 434
Hibbert *v.* Cooke 397
Hickey *v.* Burt 42
Hickmott's Case 26
Hide *v.* Heywood 350
Higginbotham *v.* Holme 285
Higgins, Re 402
Higginson *v.* Barneby 206
——— *v.* Kelly 285
Hilbers *v.* Parkinson 326, 327
Hill *v.* Gomme 170
——— *v.* Hill 206
——— *v.* Trenery 347
Hill, Re, Hill *v.* Hill 282
Hillman, Ex parte 170, 185
Hilton, Re ..... 488 (n.)

PAGE
Hindle *v.* Taylor ... 465 (n.), 711 (n.)
Hindley *v.* Westmeath ... 96, 100, 101
Hine *v.* Dodd ... 16
Hinton *v.* Hinton ... 361
Hirschfield *v.* London, Brighton, and South Coast Ry. Co. ... 43
Hobbs *v.* Hall ... 93, 94
Hobday *v.* Peters ... 347
Hoblyn *v.* Hoblyn ... 380, 383, 715 (n.)
Hobson *v.* Ferreby ... 158
Hobson's Trusts, Re ... 463 (n.)
Hodge's Estate, Re ... 309
Hodgens *v.* Hodgens ... 156
Hodges *v.* Hodges ... 297
——— *v.* Smith ... 297
——— *v.* Waddington ... 811 (n.)
Hodgkinson *v.* Fletcher ... 101, 102
Hodgson *v.* Dean ... 17
——— *v.* Hutchinson ... 205
Hodson *v.* Sharpe ... 2 (n.)
Hoey *v.* Green ... 267
Hogg *v.* Jones ... 512
Hoghton *v.* Hoghton ... 379, 380, 381, 382
Holdsworth *v.* Goose ... 315
Hole *v.* Escott ... 161
Holkirk *v.* Holkirk ... 810 (n.)
Hollier *v.* Burne ... 506
Holloway *v.* Clarkson ... 141 (n.)
——— *v.* Millard ... 180
Holmes *v.* Dring ... 279
——— *v.* Holmes ... 426
——— *v.* Penney ... 178, 286
——— *v.* Prescott ... 400
Holyland *v.* Lewin ... 299
Honeycomb *v.* Waldron ... 15
Honeywood *v.* Foster ... 524, 790 (n.)
Honor *v.* Honor ... 198
Honywood *v.* Honywood ... 144 (n.), 390, 392
Hood *v.* Franklin ... 328, 333
Hooper's Trusts, Re ... 328
Hope *v.* Hope ... 92, 110
Hopgood *v.* Parkin ... 274
Hopwood *v.* Hopwood ... 427
Hore *v.* Becher ... 44
Horlock *v.* Smith ... 44
——— *v.* Wiggins ... 420
Hornblower *v.* Proud ... 243
Horne's Settled Estates, Re, 229 (n.), 494 (n.)
Hotchkin *v.* Humfrey ... 408
Hotchkin's Settled Estates, Re ... 472
Hotchkys, Re, Freke *v.* Calmady 396
Houghton, Ex parte ... 245
Houghton's Estate, Re ... 468 (n.), 470 (n.), 480 (n.)
Household, Re ... 396
How *v.* Godfrey ... 350
Howard *v.* Digby ... 385, 386
——— *v.* Ducane ... 488 (n.)
——— *v.* Hooker ... 251
Howarth, Re ... 310
Howell *v.* Hanforth ... 115 (n.)
Howgrave *v.* Cartier ... 407
Howkins *v.* Jackson ... 44
PAGE
Hudson *v.* Hudson ... 30, 811 (n.)
Hughes, Re ... 657 (n.)
——— *v.* Young ... 329
Hulme *v.* Chitty ... 99
Humberstone *v.* Chase ... 809 (n.)
Hunt *v.* Hunt ... 91, 106, 111
——— *v.* Neve ... 19
Hurford *v.* Pile ... 28
Hurst *v.* Hurst ... 288
Hutchinson *v.* Savage ... 36, 37
Hutton *v.* Eyre ... 35, 38 (n.)
Hyde *v.* Hyde ... 134 (n.)

I.

Ibbetson, Ex parte ... 249
Ingle *v.* Partridge ... 271, 276
Ingram's Trust, Re ... 281
Innell *v.* Newman ... 42
Irons *v.* Kidwell ... 16
Isaac *v.* Wall ... 505
Izon *v.* Butler ... 808 (n.)

J.

Jackson *v.* Hobhouse ... 292
——— *v.* Tyas ... 260
——— Re, Jackson *v.* Talbot ... 396, 398
Jacomb *v.* Harwood ... 30
James' Settled Estate, Re ... 492 (n.)
Jarman *v.* Woolston ... 241
Jee *v.* Thurlow ... 93, 97
Jefferys *v.* Jefferys ... 173
Jegon *v.* Vivian ... 446 (n.)
Jenner *v.* Jenner ... 380, 382, 383
Jenny *v.* Andrews ... 136 (n.)
Jervoise *v.* Northumberland (Duke of) ... 515
Jeyes *v.* Savage ... 407 (n.)
Jodrell *v.* Jodrell ... 94, 97, 385
Joel *v.* Mills ... 287
Johns *v.* James ... 191
Johnson, Re ... 178, 240
——— *v.* Gallagher ... 134 (n.), 136 (n.)
——— *v.* Holdsworth ... 42
——— *v.* Johnson ... 144
——— *v.* Telford ... 302, 351
Johnston *v.* Sumner ... 102
——— Re, Cockerell *v.* Essex (Earl of) ... 511, 516
Jolland *v.* Stainbridge ... 16
Jones, Re ... 441 (n.), 442 (n.), 493 (n.)
——— Ex parte ... 135 (n.)
——— *v.* Davies ... 366
——— *v.* Gibbon ... 2 (n.)
——— *v.* Herbert ... 31
——— *v.* Hill ... 395
——— *v.* Jones ... 410, 505
——— *v.* Maggs ... 417
——— *v.* Strafford (Lord) ... 811 (n.)

PAGE
Jones *v.* Waite 92, 94, 96
Jones' Will, Re 329
Jordan, Re 298
Jorden *v.* Money 212
Joyce *v.* Hutton 170
Jthell *v.* Beane 173
Judkin's Trusts, Re 306, 307
Jupp, Re, Jupp *v.* Buckwell... 132 (n.), 133 (n.), 367

K.

KANE *v.* Kane 333
Kavanagh *v.* Morland 433
Kaye *v.* Waghorn 28
Keer *v.* Brown ..... 527, 528 (n.)
Kelson *v.* Kelson 165
Kemp's Settled Estates, Re..... 518
Kempson *v.* Ashbee 48
Kerr *v.* Jeston 41
Kerrison's Trust, Re..... 308
Kershaw's Trusts, Re 313
Kevan *v.* Crawford 177
King *v.* Gillett 201
—— *v.* Mullins..... 47, 49
Kingdon *v.* Tagert 213
Kingsman *v.* Kingsman 144
Kinsman *v.* Barker 44
Kirk *v.* Eddowes ..... 431 (n.)
Knatchbull's Settled Estates, Re 460, 472
Knight *v.* Browne..... 285
——— *v.* Cole 36, 37, 45
Knox *v.* Simmonds 41
Knowles' Settled Estates, Re ... 440, 518 (n.)
Kronheim *v.* Johnson 131

L.

LACEY *v.* Hill 360
——— *v.* Kynaston..... 27, 35
Lackenstein *v.* Lackenstein 211
Lambert *v.* Lambert..... 99, 103
——— *v.* Peyton 198
Lambert's Estate, Re... 133 (n.), 251, 332, 367
Lampet's Case..... 39, 808 (n.)
Lancaster *v.* Harrison 27
Landsdowne (Lord) *v.* Landsdowne (Lady) 395
Langdon *v.* Stokes 28
Lassence *v.* Tierney..... 201, 205, 213
Laver *v.* Fielder 214
Lawes *v.* Lawes ..... 426, 429, 431, 431 (n.)
Lawless *v.* Mansfield 44
Lawrence *v.* Maggs 506
Leach *v.* Leach 414
Leadbitter, Re ..... 467 (n.)
Leake *v.* Leake ... 415, 415 (n.), 418
Lear *v.* Leggett..... 289
Leche *v.* Kilmorey (Lord) ... 28 (n.)

PAGE
Lechmere and Lloyd, Re..... 400
Lee *v.* Head 416
—— *v.* Sankey 335
Leeds *v.* Barnardiston 157
Legg *v.* Goldwire 207, 208
Legh *v.* Legh..... 31
Leigh, Re, Leigh *v.* Leigh... 144, 153, 153 (n.), 156, 158, 159, 265
Leigh's Estate, Re..... 397
Le Neve *v.* Le Neve..... 16, 17
Lesingham's Trusts, Re 318
Leslie, Re, Leslie *v.* French 348
Lester *v.* Garland ... 41, 285, 285 (n.)
Lethbridge *v.* Thurlow 402
Levy's Trusts, Re..... 289, 487
Lewis *v.* Fothergill ..... 446 (n.)
——— *v.* Freke 412
——— *v.* Jones 27
——— *v.* Lee 91
——— *v.* Madocks..... 321
Lewis Bowles' Case..... 390, 401
Lidler *v.* Wilmot 102
Lincoln (Lady) *v.* Newcastle (Duke of) 515
Lindo *v.* Lindo..... 45, 46
Lister *v.* Hodgson..... 192
Little's Will, Re 298
Livesey *v.* Livesey .... 811 (n.)
Llanelly Rail., &c., Co. *v.* London & N. W. Rail. Co..... 94
Llewellin *v.* Williams... 390, 478 (n.)
Llewellyn *v.* Mackworth ... 147 (n.)
Lloyd *v.* Attwood 48, 178
——— *v.* Cocker..... 312
——— *v.* Lloyd 287
——— *v.* Smith 44
Lloyd Generale Italiano, Re 270
Lock *v.* Hetherington 26
Lockyer *v.* Savage..... 285
Lofthouse, Re 309
Logan *v.* Birkett 93, 94, 109
Londesborough (Lord) *v.* Somerville (Lord) 281
London and Provincial Bank *v.* Bogle ..... 142 (n.), 294
——— and S. W. Rail. Co. *v.* Blackmore 43
Lord *v.* Bunn..... 286 (n.)
Lovat *v.* Fraser..... 351
——— (Lord) *v.* Leeds (Duchess of).....392, 402, 689 (n.)
Lovesy *v.* Smith 208, 209
Lowndes *v.* Norton 392
Lowther *v.* Bentinck 312
Loxley *v.* Heath 213
Luders *v.* Anstey 201, 204
Lupton *v.* White 279
Lyall *v.* Edwards 46

M.

MABERLEY *v.* Maberley 272
Machu, Re 285
Mackay *v.* Douglas..... 178, 179, 180, 183

PAGE
Mackenzie's Settlement, Re 331, 332
——————— Trusts, Re ..... 458 (n.), 477 (n.)
Mackie *v.* Herbertson ... 172, 173, 189
Macleod *v.* Annesley 266
Maconbrey *v.* Jones 405
Maddison *v.* Alderson 212
——————— *v.* Andrew..... 303
Maddy *v.* Hale 506, 510
Magnus *v.* Queensland, &c., Bank 272
Mainwaring's Settlement, Re..... 326
Malcolm *v.* Charlesworth 19
Manby *v.* Scott..... 102 (n.)
Manning *v.* Chambers..... 287
——————— *v.* Cox 42
——————— *v.* Gill 159
Mansel's Settled Estates, Re 486 (n.)
Mansell *v.* Mansell 373
Manson *v.* Baillie 352
Mara *v.* Manning 346
March, Re, Mander *v.* Harris 132 (n.), 367
Marker *v.* Kekewich..... 410
——— *v.* Marker 393
Marlborough (Duke of) *v.* Marjoribanks... 459 (n.), 463 (n.), 480 (n.), 488 (n.)
——————————— *v.* Sartoris 484
Marsh *v.* Russell 48
——— and Granville (Earl), Re... 384
Marshall *v.* Marshall..... 94, 100, 105
——————— *v.* Rutton 101
——————— *v.* Smith..... 360
Martelli *v.* Holloway ..... 513 (n.)
Martin *v.* Foster 154, 157
——— *v.* Martin 147, 158
Massey, Ex parte 241
——————— *v.* Rowan ..... 495 (n.)
Massie *v.* Drake..... 44
Master *v.* Croismar 324
Matthew *v.* The Northern Assurance Co. 247
Matthews *v.* Paul..... 404, 406
Maund *v.* Allies..... 43
Maunsell *v.* White 212
Mayn *v.* Mayn 198
McCarogher *v.* Whieldon 424
McCormick *v.* Carnett..... 162
McDonnell *v.* Hesilbridge 255
Mead *v.* Orrery (Lord) ..... 808 (n.), 811 (n.)
Meager *v.* Pellew 293
Meaghan, Re 285
Mease *v.* Mease 28
Meinertzhagen *v.* Davis 304
——————————— *v.* Walters 425
Mercers' Company, Ex parte 477 (n.)
Merryweather *v.* Jones..... 150
Metcalfe *v.* Pulvertoft..... 168
——————— *v.* Rycroft 32
Meymot, Ex parte..... 641 (n.)
Meyrick *v.* Laws 500
Michell *v.* Malings 214
——————— *v.* Michell 414
PAGE
Michell's Trusts, Re..... 328
Michlethwait *v.* Michlethwait ... 393
Middlemore *v.* Goodall..... 31
Middleton's Case ..... 811 (n.)
Miles *v.* Jarvis 400
——— *v.* Williams..... 29
Miller *v.* Miller ..... 453 (n.)
Millet *v.* Rouse 156
Mills *v.* Capel 537
——— *v.* Fox 214
Mills' Estate, Re ..... 477 (n.)
——— Trusts, Re ..... 657 (n.)
Milner *v.* Harewood (Lord) 145
Milroy *v.* Lord 189
Milsington *v.* Musgrave 510
Mizen *v.* Pick..... 101
Moloney *v.* Kennedy 101
Molton *v.* Camroux 159
Money *v.* Money 158
Moneypenny *v.* Moneypenny..... 218
Monger *v.* Kett..... 42
Montacute *v.* Maxwell 202, 205
Montagu *v.* Sandwich (Earl of) 418, 419, 422
Montefiore *v.* Behrens 285, 288
——————— *v.* Enthoven 288
——————— *v.* Guedella 424, 426
Montgomery *v.* Montgomery 433
Montmorency *v.* Devereux 44
Moody *v.* King 371
Moore *v.* Culverhouse 18
——— *v.* Frowd 352, 354
——— *v.* Hart 204
——— *v.* Moore 106, 386
——— *v.* Simkin 435
——— *v.* Walters 373
——— *v.* Webster..... 364
——— Re, Moore *v.* Johnson 282
Morecock *v.* Dickins..... 17
Morgan, Re .....441 (n.), 443 (n.), 445 (n.), 492 (n.), 518 (n.)
——————— *v.* Morgan.....364, 537
——————— *v.* Thomas 433
Morley *v.* Frear..... 27
Morrall *v.* Morrall..... 101
Morres *v.* Hodges 510
Morris *v.* Morris 393
——————— *v.* Wilford..... 45
Mortimer *v.* Slater 320
——————— *v.* Watts 510
Mortimore *v.* Mortimore..... 320
Mounsey *v.* Blamire 433
Mountstephen *v.* Brooke..... 31
Mowbray, Ex parte 243
Moxon *v.* Payne 383
Muggeridge's Trusts, Re 287
Mundy *v.* Earl Howe 308
Murphy, Re.....285, 497 (n.)
Murray, Re 144
——————— and Hegarty's Contract, Re 17
Musgrave *v.* Sandemann..... 297

PAGE

N.

Naden, Ex parte 95
Naylor and Spendla's Contract, Re..... 441 (n.), 457 (n.)
Neal *v.* Sheffield 28
Neale *v.* Neale 379
Negus *v.* Foster..... 99
New *v.* Jones..... 352
Newcastle (Duke of) *v.* Lincoln (Lady) 515
Newcastle's Estates (Duke of), Re 389, 452 (n.), 456 (n.), 490 (n.)
Newman *v.* Beaumond..... 41
——— *v.* Hutton 44
Newstead *v.* Searles 172, 173, 174
Newton's Settled Estates, Re, *Addenda*
Nichols *v.* Danvers 97
——— *v.* Ramsden..... 41
Nicol *v.* Nicol 99
Nicoll's Estates, Re 351
Nightingale *v.* Lawson 509
Nixon *v.* Hamilton 93
——— *v.* Verry 288
Noel *v.* Robinson ...811 (n.), 812 (n.)
——— *v.* Walsingham (Lord) 416
Nokes *v.* ——— 37
Norris, Re 342
——— *v.* Wright 267
Northey *v.* Northey .....808 (n.)
Norton *v.* Wood .....29 (n.)
Nouaille *v.* Greenwood 526
Nunn *v.* Wilsmore 93

O.

O'Byrne's Estate, Re 17
Official Receiver, Ex parte, Re, Holden ...194, 350
——— ——— *v.* Tailby 321
Offley *v.* Ward 32
Ogle, Ex parte ..... 479 (n.)
Oldaker *v.* Lavender 44
Olive *v.* Westerman 273
Oliver *v.* Daniel..... 45
——— *v.* Oliver..... 197
Onslow *v.* Michell..... 415
——— Re, Plowder *v.* Gayford 133 (n.), 141 (n.)
Orr *v.* Kaines .....811 (n.)
Osborne *v.* Churchman .....813 (n.)
Otway-Cave *v.* Otway..... 414

P.

Page *v.* Horne.....254, 255
——— *v.* Way .....619 (n.)
Paget's Will, Re 505
Paine's Case, Re 370
Palliser *v.* Gurney ...134 (n.), 135 (n.)
Parker, Re .....447 (n.)
——— *v.* Alcock 44
——— *v.* Carter 168

PAGE

Parker's Trusts, Re 215
Parkes *v.* Bott 245
Parkinson *v.* Dashwood 240
Parnham's Trusts, Re 287
Parrott, Re, Walter *v.* Parrott 197, 207
Parsons *v.* Parsons 161
Pascoe *v.* Pascoe 43
Paul *v.* Paul.....171, 189
Paulter *v.* Cornhill 368
Pawson *v.* Brown 166, 255
Payler *v.* Homersham 34, 35, 45
Payne *v.* Little 296
——— *v.* Rogers 31
Peacock *v.* Colling 351
——— *v.* Monk 385
Peacock's Estate, Re 424
Peacocke *v.* Pares..... 405
Pearce *v.* Graham 332
Peareth *v.* Marriott 402
Pearson, Re 179
——— *v.* Bank of England 809 (n.)
——— *v.* Pearson 146
Pease *v.* Pattinson 873
Pedder's Settlement Trusts..... 328
Pells *v.* Brown.....492 (n.)
Pemberton *v.* McGill 346
Pennington, Re..... 177
——— ——— *v.* Cardale .....857 (n.)
Penny *v.* Allen 537
Pentland *v.* Stokes 17
Perceval *v.* Perceval..... 399
Perfect *v.* Curzon 407
Perres *v.* Bishop 28
Persse *v.* Persse.....44, 165, 380
Petre *v.* Petre 310
Peyton's Settlement Trusts..... 269
Phelps *v.* Sprowle..... 44
Phillips, Re 153
——— *v.* Claggett..... 42
——— *v.* James 198, 432
——— *v.* Mullings..... 193
——— *v.* Phillips.....140 (n.), 245
——— *v.* Smith 390
Picard *v.* Anderson 280
Pickering *v.* Pickering..... 44
Piggott *v.* Stratton 212
Pigot *v.* Bullock 389
Pike *v.* Fitzgibbon .....135 (n.)
Pinney *v.* Pinney .....811 (n.)
Platt *v.* Platt 424
Player, Re 182, 183
Playters *v.* Abbott 505
Plunkett *v.* Lewis..... 429
Pollock *v.* Worrall.....418, 424, 431
Porter, Re .....519 (n.)
——— *v.* Phillips..... 40
Portlock *v.* Gardner..... 44
Potter, Re 153
Poulet *v.* Poulet..... 409
Powell *v.* Evans 30
——— *v.* Oakley .....152 (n.)
——— *v.* Powell 101
——— *v.* Price 199, 211
Powell's Trusts, Re.....494 (n.)
Powys *v.* Blagrave.....395, 396
——— *v.* Mansfield 424, 429, 430

PAGE
Poyser *v.* Harrison 355
Pratt *v.* Hall 399
——— *v.* Matthew 318
Price, Ex parte 244
——— Re .....133 (n.), 494 (n.)
——— *v.* Jenkins 169, 173
Prince's Case ..... 811 (n.)
Proctor *v.* Robinson 96, 99
Prole *v.* Goady 212
Pullen *v.* Ready 379
Pulvertoft *v.* Pulvertoft.....171, 190
Punchard *v.* Tomkins..... *Addenda*
Pye, Ex parte 430
——— *v.* Gorge..... 373
Pym *v.* Lockyer 289, 424, 430

Q.

Queade's Trust 142, 148

R.

R., (*see* Reg. and Rex.)
— *v.* Bishopstoke.....686 (n.)
— *v.* Holland..... 161
— *v.* Mead..... 100
— *v.* Rigge .....686 (n.)
— *v.* Stone..... 811 (n.)
— *v.* Winton .....100 (n.)
Raby *v.* Ridehalgh 345
Ramsden *v.* Hylton 43, 45, 166
——— *v.* Langley..... 351
——— *v.* Smith...323, 324, 324 (n.), 325
Randle *v.* Gould..... 99
——— *v.* Morgan 201, 205
——— *v.* Willis 195
Ranelagh's (Lord) Will 506
Ray *v.* Ray..... 371
Ray's Settled Estates, Re ...482, 483, 484, 496 (n.)
Read *v.* Bullocke 38
Reed *v.* Morris 27
Reeves *v.* Brymer..... 28
Reid *v.* Reid ...137 (n.), 215, 286, 321
——— *v.* Hoare 405
Renault, Re.....519 (n.)
Reresby *v.* Newland..... 413
Reg. (*see* R. and Rex.)
Reg. *v.* Registrar of Middlesex...3 (n.)
——— *v.* Truro (Lord) .....5 (n.)
Rex (*see* R.)
— *v.* Bayley 34
— *v.* Haverstock..... 41
— *v.* Stevens 41
— *v.* Wait .....29 (n.)
Reynolds, Re .....462 (n.), 536
Rhodes *v.* Bates..... 381
——— *v.* Whitehead 400
Rice *v.* Gordon 165
Richardson, Ex parte 32, 33, 240
——— *v.* Moore 510
Rickman *v.* Morgan 415, 424
Rider *v.* Wager .....808 (n.)

PAGE
Ridge, Re, Hellard *v.* Moody...229 (n.), 452 (n.), 453 (n.), 478 (n.)
Ridler, Re 170
Rivers (Lord), Re .....479 (n.)
——— *v.* Derby (Earl) 409
Roberts, Re .....519 (n.)
——— *v.* Dixwell 364
——— — *v.* Edwards 245
Robertson *v.* Richardson..... 287
Robinson *v.* Gandy 330
——— *v.* Robinson 269, 270
——— *v.* Wood 288
Roche *v.* Morgell 41, 44
Rochefort *v.* Fitzmaurice..... 198, 199
Rochford *v.* Hackman 285
Rodney (Lord) *v.* Chambers 97
Roe *v.* Hayley 31
Roffey *v.* Bent 288
Rogers *v.* Ancaster 29
——— *v.* James ..... 811 (n.)
——— *v.* Payne 27
Rooke *v.* Kensington (Lord) 210
Roper, Re, Roper *v.* Doncaster 135 (n.)
Roper's Trusts, Re..... 309
Roper Curzon *v.* Roper Curzon ... 312
Rose *v.* Rose 107
Rosher *v.* Rosher 285
Rothschild *v.* Brookman 44
Round *v.* Turner..... *Addenda*
Routledge *v.* Dorril ..... 546 (n.)
Row, Re..... 462 (n.)
Rowe, Re, Jacobs *v.* Hind ... *Addenda*
Rowland *v.* Morgan 514, 516
——— *v.* Witherden..... 272
Rowley *v.* Rowley..... 106
——— *v.* Unwin..... ..... 30 (n.)
Rownson, Re 201
Royds *v.* Royds 267
Rudge *v.* Winnall ..... 611 (n.)
Ruffles *v.* Alston 98, 99
Russel's Case ..... 810 (n.)
Russell, Ex parte, Re Butterworth... 179, 179 (n.), 180, 183, 194
Rutland's (Duke of) Settlement, Re 462
Ryder *v.* Bickerton 346

S.

SABIN, Re ..... 450 (n.)
Sackville West *v.* Holmesdale (Lord)..... 511
Sadler *v.* Rickards 402
Saffron Waldron, &c., Soy. *v.* Rayner 243, 485
St. Aubyn *v.* Humphreys 321
St. John's College, Oxford, Ex parte 259, 260
St. John (Lord) *v.* St. John (Lady) 90, 93 (n.), 97, 101, 110
Salisbury *v.* Bagott 145
Salkeld *v.* Science..... 44
——— *v.* Vernon..... 44
Salter *v.* Kidgley 33
Sampson and Wall, Re... 152, 155, 157, 158

PAGE
Samuel *v.* Samuel 287
——— *v.* Ward..... 416, 428
Sanders *v.* Rodway 100
Sandemann *v.* Mackenzie 406
Sanger *v.* Sanger ..... 142 (n.), 294
Sankey *v.* Golding 91
Saunders *v.* Evans..... 302
Saunders' Case ..... 809 (n.)
Savage, Re..... 447 (n.)
Savage's Case (Sir John), Re..... 369
Savill *v.* Savill ..... 147 (n.)
Sawyer *v.* Sawyer..... 345, 346
Scarsdale (Lord) *v.* Curzon ..... 511, 513 (n.), 514
Scholfield *v.* Redfern 281
——— *v.* Spooner 326, 333
School Board for London, Ex parte, Re Hart..... *Addenda*
Schreiber *v.* Dinkel 175
Scott *v.* Milne 44
—— *v.* Morley..... 134 (n.), 142 (n.)
—— *v.* Steward 206
Scrafton *v.* Quincey..... 15, 15 (n.)
Scudamore *v.* Vanderstone..... 32
Seaton *v.* Seaton ... 144, 146 (n.), 149, 152 (n.), 155, 158
Sebright's Settled Estates ... 455 (n.), 458 (n.), 460 (n.), 486 (n.), 488 (n.)
Seccombe *v.* Saunder 48
Seeling *v.* Crawley 91
Sellers *v.* Beckford..... 28 (n.)
Sells *v.* Sells 210
Sergeant, Re 318
Seymour *v.* Lucas..... 287
Seymour's Case..... 371
Seyton, Re, Seyton *v.* Satterthwaite ..... 138 (n.)
Shafto *v.* Adams 244
Shafto's Trusts, Re 343
Shakespear, Re..... 134 (n.), 135 (n.)
Sharpe, Re..... 530 (n.)
——— *v.* Foy ..... 145 (n.)
Shaw's Settled Estates, Re... 260 (n.)
Sheldon, Re, Nixon *v.* Sheldon ... 283
——— *v.* Cox 16
Shelley *v.* Shelley..... 516
——— *v.* Westbrooke..... 112
Shelley's Case..... 198, 209
Sheppard *v.* Wilson ..... 115 (n.), 413
Shewall *v.* Dwarris 95
Shurmur *v.* Sedgwick ... 170, 176, 365
Sibthorp *v.* Moxom ..... 808 (n.)
Sidney *v.* Sidney 362
Simons *v.* Johnson 46
Simpson *v.* Bathurst..... 455 (n.)
Simson *v.* Jones ... 145, 146 (n.), 147
Sitwell, Ex parte 314
Skeffington *v.* Whitehurst 46
Skilbeck *v.* Hilton 43, 48
Skillet's Trusts, Re..... *Addenda*
Skingley, Re 388, 396
Slatter *v.* Slatter 101, 109
Slocomb *v.* Glubb..... 144
Small *v.* Hedgeley..... 143 (n.)
Smart *v.* Tranter 367
Smethhurst *v.* Hastings..,267, 268, 271

PAGE
Smith *v.* Iliffe 208
—— *v.* Lucas 148, 149
—— *v.* Mapleback..... 27
—— *v.* Spence..... 148, 150
—— *v.* Stoneham 277
—— Re, Ex parte L. & N. W. Rail. Co. ..... 462 (n.)
Smith's Estate, Re ..... 133 (n.)
Smyth *v.* Foley..... 412, 413
Société Cockerill, Ex parte 42
Soilleux *v.* Herbst..... 97
Solly *v.* Forbes 35
—— *v.* Wood 509
Southampton (Lord) *v.* Brown ... 33
Speight *v.* Gaunt 271, 272, 274, 336, 344
Spencer *v.* Spencer 405
Spirett *v.* Willows..... 178, 179
Spurgeon *v.* Collier 166, 205
Spurway's Settled Estates, Re 476 (n.)
Spyer *v.* Hyatt 360
Stackpoole *v.* Beaumont 156
Stahlschmidt *v.* Lett 360
Stamford (Lord) *v.* Hobart..... 198
Stamford's (Lord) Estate, Re ... 461 (n.), 467 (n.), 488 (n.), 493 (n.)
Standing *v.* Bowring 189
Stanes *v.* Stanes 100
Stanley *v.* Barnes..... 30
——— *v.* Bond 41
——— *v.* Stanley 292
Stapilton *v.* Stapilton 379
Stephens, Ex parte 285
——— *v.* Olive 93
Stevenson *v.* Mayor of Liverpool 809 (n).
Stewart *v.* Stewart..... 44, 304, 425
Stickney *v.* Sewell 266, 273
Stileman *v.* Ashdown 183
Stocken *v.* Stocken 308
Stockley *v.* Stockley..... 379
Stokes *v.* Stokes..... 37
Stone *v.* Godfrey 379
—— *v.* Theed 505
Stones *v.* Rowton 342
Stonor's Trusts, Re ..... 141 (n.), 333
Storer *v.* Gordon 33
Stott *v.* Milne 350, 351
Stoughton *v.* Lee 360
Strangeways, Re, Hickley *v.* Strangeways ..... 441 (n.), 493 (n.)
Strathmore (Countess of) *v.* Bowes 251, 254
Stretton *v.* Ashmall 267
Strickland *v.* Symons 240, 349
Strong, Re 154
Stuckley's Settlement, Re ... 688 (n.)
Styles *v.* Grey 279
Sudeley's Settled Estates, Re 460 (n.)
Suggitt's Trusts, Re..... 215
Sumner *v.* Partridge..... 371
Sumpter *v.* Cooper ..... 2 (n.), 18
Surcome *v.* Pinniger 203, 204, 205, 213
Sutton *v.* Sutton ..... 471 (n.)
Sutton's Trusts, Re 247
Swaine *v.* Burton 433
Swallow *v.* Binns..... 407, 408
Sweetapple *v.* Horlock..... 332

PAGE
Swift *v.* Swift 95
Symington *v.* Symington 112
Symonds *v.* Hallett ..... 132 (n.), 367
——— *v.* Wilkes 206
Synnot *v.* Simpson 191

T.

TAGGART *v.* Taggart ... 196, 196 (n.), 198
Tailby *v.* Official Receiver ... 180, 181
Talbot *v.* Marshfield..... 313
Tamplin *v.* Miller 297
Tarback *v.* Marbury 180
Tardiff *v.* Robinson 510
Taylor, Re ..... 112, 496 (n.)
——— *v.* Beach 205
——— *v.* Blacklow 279
——— *v.* Cartwright 424
——— *v.* Coenen 178
——— *v.* Harewood (Earl of) ... 500
——— *v.* Johnson 307
——— *v.* Poncia ..... 490 (n.)
——— *v.* Taylor 313
Teasdale *v.* Braithwaite 175
Tempest *v.* Camoys (Lord)..... 309
Temple *v.* Thring 517
Teynham (Lord) *v.* Webb 404
Thatcher's Trusts, Re 310
Theed's Settlement, Re 406
Thimbleby *v.* Barron 27
Thomas *v.* Brennan 254
——— *v.* Courtnay 28
——— *v.* Price..... 292
——— *v.* Thomas ..... 317, 546 (n.)
——— *v.* Williams .....226, 448 (n.), 449 (n.)
Thomas' Settlement, Re..... 336
Thompson, Ex parte 298
——— *v.* Brown ..... 28 (n.)
——— *v.* Harrison..... 35, 38
——— and Curzon, Re ... 137 (n.)
Thornhill *v.* Millbank..... 462 (n.)
Thornton *v.* Bright 324
Thorpe *v.* Thorpe 39, 40, 45
Thrupp *v.* Harman 385
Thynne (Lady) *v.* Glengall (Earl of) 204, 418, 421, 424, 428
Tibbets *v.* George 243
Tidswell, Re ..... 136 (n.)
——— *v.* Ankerstein 245
Tierney *v.* Wood 131
Titley *v.* Durant 97
Todd *v.* Moorhouse 348, 349
—— Ex parte, Re Ashcroft 182
Toker *v.* Toker 193
Tollemache *v.* Coventry 512
Torre *v.* Torre ..... 209, 211, 291 (n.)
Townend *v.* Toker..... 165, 170
——— *v.* Townend 266
Townsend *v.* Harrowby 324
——— *v.* Windham 385
Townson *v.* Tickell ..... 810 (n.)
Trafford *v.* Boehm 256, 345
Trappes *v.* Meredith..... 287

PAGE
Travis *v.* Illingworth 342
Treswaller *v.* Keyne..... 28
Trevor *v.* Trevor 198, 433
Trimmer *v.* Bayne 418, 424, 431
Trollope *v.* Linton 145
Trowell *v.* Shenton 144, 149, 151
Tucker, Re..... 137 (n.)
——— *v.* Bennett..... 193, 208 (n.), 209, 210, 211, 715 (n.)
Tuffnell *v.* Bovrell..... 527
Tunstall *v.* Trappes 16, 17
Turcan, Re.....180, 181, 321, 330
Turner, Re ..... 497 (n.)
——— *v.* Hancock 194, 350
——— *v.* Turner 43
Turquand, Ex parte, Re Parker 803 (n.)
Tussaud *v.* Tussaud ... 417, 418, 419, 420, 421
Tweddell *v.* Tweddell 381
Tweedie and Miles, Re ..... 224 (n.)
Twisden *v.* Twisden..... 415, 427
Twopenny *v.* Young..... 27, 35, 45

U.

UNDERWOOD *v.* Courtown 17
Ungley *v.* Ungley... 202, 203, 213, 214
Upton *v.* Brown 319
——— *v.* Prince..... 424
——— *v.* Upton 46

V.

VANDERGUCHT *v.* De Blaquiere 97
Vane *v.* Barnard (Lord) 388
Vangrutten *v.* Digby 162, 163
Vansittart *v.* Vansittart ... 92, 95, 110
Vardon's Trusts, Re..... 148, 292, 326
Vaughan, Re 873
——— *v.* Burslem 514
——— *v.* Vanderstegen ... 136 (n.)
Viant's Trusts, Re..... 329
Vickers *v.* Vickers..... 427
Vickery *v.* Evans 268, 269, 274
Vincent *v.* Vincent 201, 205
Viret *v.* Viret ..... 214 (n.)
Vyse *v.* Wakefield..... 245 (n.), 249

W.

WAINEWRIGHT, Re..... 530 (n.)
Wainford *v.* Heye ..... 141 (n.)
Wainwright *v.* Bland 244
Waite *v.* Jones 93
——— *v.* Littlewood..... 283
——— *v.* Morland..... 330
Wake *v.* Parker..... 139 (n.)
Wakefield *v.* Maffet 407
Walcot *v.* Botfield 504
Waldo *v.* Waldo 392
Walhampton Estate, Re 169
Walker *v.* Bradford Old Bank 242 (n.)

PAGE

Walker *v.* Burrows 165
——— *v.* Symonds 48
Walker and Hughes' Contract, Re 341
Walker's Trusts, Re 518
Wall, Re 873
Wallace *v.* Donegal (Marquis of) 16
——— *v.* Wallace 382
Walmesley *v.* Cooper 27, 35
——— *v.* Vaughan 304
Walrond *v.* Walrond 92, 95
Walter *v.* Barrett 47
Walwyn *v.* Coutts 190
Wankford *v.* Fotherley 204
——— *v.* Wankford ..... 811 (n.)
Warburton *v.* Loveland and Ivie . 18
Ward *v.* National Bank of New Zealand 38
Ward's Estate, Re ..... 462 (n.)
Warde, Re 256, 283
——— *v.* Warde 112
Warden *v.* Jones ... 166, 201, 202, 203, 205, 213
Ware *v.* Gardner 178, 179
Waring *v.* Waring 279
Warner, Ex parte 112
——— *v.* Moir 504
Warren's Settlement, Re 297
——— Trusts, Re 433
Warwick *v.* Rogers ..... 28 (n.)
Warwicker *v.* Bretnall 397
Watkyns *v.* Watkyns 201
Watt *v.* Wood 417
Watts *v.* Bell 362
Weall *v.* Rice 418, 419, 420
Webb *v.* Jonas 268
——— *v.* Ledsam ..... 336 (n.)
Webster *v.* Webster 96, 98
Weckett *v.* Raby ..... 28 (n.)
Wedderburn *v.* Wedderburn 44
Wedderburn's Trusts, Re ... 260, 800
Weir, Re, Hollingworth *v.* Willing 15, 16
Welchden *v.* Elkington ..... 809 (n.)
Wellesley *v.* Beaufort 310
——— *v.* Wellesley 393
Wells, Re ..... 494 (n.)
——— *v.* Malbon 316
Welman *v.* Welman ..... 207, 716 (n.)
West *v.* Errissey 199
Westbrook *v.* Blyth ..... 8 (n.)
Westmeath *v.* Salisbury 96
——— *v.* Westmeath ... 90, 95, 96, 97, 98
Westwick *v.* Wyers ..... 812 (n.)
Wetherby *v.* Dixon 417, 431
Wheatley, Re 148
Wheelwright *v.* Walker, 440, 443 (n.), 449 (n.), 481 (n.), 484, 488 (n.), 518 (n.), 520
White *v.* Chitty 287
——— *v.* Cox 150
——— *v.* Grane 301
——— *v.* White 505
Whitehead, Ex parte 202, 213
Whitehouse, Re 314

PAGE

Whiteley, Re, Whiteley *v.* Learoyd 266, 271, 272, 273, 274, 280
Whitmore *v.* Mason ... 285, 285 (n.)
Whitney *v.* Smith 280
Wickham *v.* Wing 161
Wigney *v.* Wigney 317
Wild *v.* Williams 42
Wilder *v.* Piggott 149, 151
Wiles *v.* Gresham ..... 479 (n.)
Wilkes' Estate, Re ..... 478 (n.)
Wilkins *v.* Hogg 344
Wilkinson *v.* Gibson 316
——— *v.* Lindo 31
——— *v.* Nelson 209
Willan, Re ..... 479 (n.)
Willand *v.* Fen 30
Williames, Re, Andrew *v.* Williames 396
Williams *v.* Bailey 106
——— *v.* Burgess 41
——— *v.* Evans 204
——— *v.* Lee ..... 809 (n.)
——— *v.* Mercer 323, 329
——— *v.* Pen 30
——— *v.* Sorrell ..... 6 (n.), 15, 17
——— *v.* Ware ..... 462 (n.)
——— *v.* Williams ... 165, 493 (n.)
Willis *v.* Brown ..... 2 (n.)
Willmott's Trusts, Re ..... 407 (n.)
Willock *v.* Noble 133 (n.), 316, 447 (n.)
Willoughby *v.* Backhouse 28
——— *v.* Middleton ... 147 (n.), 149, 324
Wills *v.* Rich ..... 811 (n.)
Wilson *v.* Atkinson ..... 319 (n.)
——— *v.* Barnes 873
——— *v.* Glossop 102
——— *v.* Mushett 99
——— *v.* Rhodes ..... 812 (n.)
——— *v.* Turner 307, 308
——— *v.* Wilson ..... 91, 92, 93, 93 (n.), 94
Wilton *v.* Hill ..... 30 (n.)
Winchelsea's (Earl of) Policy Trusts, Re 348
Windham's Case 34
Wise, Re 178
Wiseman *v.* Westland 17
Wollaston *v.* Hakewell ..... 20 (n.)
——— *v.* Tribe 193, 210
Wolterbeek *v.* Barrow 208
Wombwell *v.* Belasyse ... 392 (n.), 393
Wood, Re ..... 462 (n.)
——— *v.* Gaynon 388
Wood's Estate, Re 506
Woodhams *v.* Herrick 503
Woodhouse *v.* Walker ... 388, 395, 396
Woodward *v.* Darcy 29
Worrall *v.* Jacob 93
Worsley *v.* Worsley 108
Worthington *v.* Evans ..... 810 (n.)
Wren *v.* Bradley 95
Wright *v.* Redgrave 186
——— *v.* Stansfeld 18
——— *v.* Vanderplank 381, 383
Wright's Trusts, Re ..... 47, 462 (n.)

PAGE
Wright's Trustees and Marshall, Re 378
Wrighton *v.* Hudson..... 17
Wyatt *v.* Barwell..... 15, 16
——— *v.* Sharratt 269
Wycherley *v.* Wycherley 380, 381
Wynter *v.* Bold 413

Y.

YELLOWBY *v.* Gower 395
PAGE
Yglesias *v.* Yglesias 317
Young *v.* Higgon 41
——— *v.* Holmes ..... 809 (n.)
——— *v.* Macintosh..... 196
——— *v.* Smith 324
——— *v.* Waterpark (Lord) 412

Z.

ZAMBACO *v.* Cassavetti 147
Zouch (Lord) *v.* Dalbiac..... 445 (n.)
——— *v.* Parsons 148

TABLE OF STATUTES.

NOTE.—*The numerals in* italics *refer to pages where the Section or Statute is set out at length. The Statutes are as in the Revised Statutes.*

PAGE

52 Hen. 3, c. (Statute of Marlbridge) 394
6 Ed. 1, c. 5 (Statute of Gloucester) 394
13 Ed. 1, c. 34 (Statute of Westminster) 359
4 Hen. 7, c. 24 (Fines) 372
11 Hen. 7, c. 20 (Estates Tail, *Ex provisione viri*) ..... 199, 372, 522, n.
27 Hen. 8, c. 10 (Statute of Uses) 401
32 Hen. 8, c. 28 (Leases by Tenants in Tail) 372
34 & 35 Hen. 8, c. 20 (Tenants in Tail) ..... 522, n.
13 Eliz. c. 5 (Fraudulent Conveyances) 93, 164, 176, 178, 286
18 Eliz. c. 7 (Benefit of Clergy) 359
27 Eliz. c. 4 (Fraudulent Conveyances) 93, 164, 167, 176
29 Eliz. c. 5 (Fraudulent Conveyances) 176
15 Car. 2, c. 17 (Bedford Level) ..... 2, n.
22 & 23 Car. 2, c. 10 (Statute of Distribution) 313
29 Car. 2, c. 3 (Statute of Frauds), s. 4 ..... *201*
2 & 3 Anne, c. 4 (West-Riding Registry) ..... 9, n.
5 Anne, c. 3 (Duke of Marlborough's Estates) ..... 492, n.
6 Anne, c. 2 (Irish Registry Act) 17, 18
c. 20 (East-Riding Registry) 9
c. 35 (East-Riding Registry) ..... 6, n., 9
7 Anne, c. 20 (Middlesex Registry) ..... 2, *et seq.*
s. 1 (Registry of Memorials) *2*
ss. 2, 3, 4 (Registrars) 3
s. 5 (Form of Memorials) *3*
s. 6 (Contents of Memorials) *4*
s. 7 (Several Writings) *5*
s. 8 (Time for Registration) *6*
s. 9 (Concealment, &c., of Wills) *6*
s. 10 (Protection of Purchasers) *7*
s. 17 (Discharge of Mortgages) *7*
s. 18 (Copyholds) *7*
s. 19 (Judgments, &c.) *8*
s. 20 (Certificate) of Registration) *9*
8 Geo. 2, c. 6 (North-Riding Registry) ..... 9, n.
9 Geo. 2, c. 36 (Mortmain Act) 261, 269, 869, 871
20 Geo. 2, c. 42 (Wales) 448
24 Geo. 2, c. 4 (Middlesex Registry) 3
11 Geo. 3, c. 78 (Bedford Level) ..... 2, n.
14 Geo. 3, c. 48 (Life Assurance) 244
36 Geo. 3, c. 73 (Bedford Level) ..... 2, n.
40 Geo. 3, c. 98 (Thellusson Act) 348
41 Geo. 3, c. 59 (Duke of Wellington's Estates) ..... 492, n.
42 Geo. 3, c. 113 (Duke of Wellington's Estates) ..... 492, n.
43 Geo. 3, c. 108 (Church Building) ..... 133, n.
46 Geo. 3, c. 146 (Lord Nelson's Estates) ..... 492, n.
53 Geo. 3, c. 134 (Lord Nelson's Estates) ..... 492, n.
54 Geo. 3, c. 161 (Duke of Wellington's Estates) ..... 492, n.
55 Geo. 3, c. 96 (Duke of Wellington's Estates) ..... 492, n.
4 Geo. 4, c. 46 (Bedford Level) ..... 2, n.
9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 5 151
11 Geo. 4 & 1 Will. 4, c. 46 (Illusory Appointments) 300

PAGE
3 & 4 Will. 4, c. 27 (Statute of Limitations) ... 537
c. 42 (Administration of Estate), s. 2 ... 396
c. 74 (Fines and Recoveries Act) ... 132, &c.
s. 1 (Interpretation) ... 492, n.
s. 15 (Power to Bar Entails) ... 521
s. 17 (Repeal) ... 199, 373
s. 18 (Reversion of Crown) ... 491, n.
s. 19 (Enlargement of Base Fee) ... 531
s. 22 (Protector of Settlement) ... 525
s. 23 (Protector as to Undivided Shares) ... 526
s. 24 (Married Woman Protector) ... 527
s. 25 (Protector of Restored Estate) ... 527
ss. 26, 27 (Lessees, Dowresses, &c.) ... 528
s. 28 (Owner of Prior Estate) ... 528
ss. 29, 30 (Tenant to Præcipe) ... 528
s. 31 (Base Trustee Protector) ... 526, 528
s. 32 (Power to Appoint Protector) ... 528, 529
s. 33 (Lunatic Protector) ... 530
s. 34 (Base Fee) ... 531
s. 35 (Consent to Enlargement) ... 531
s. 36 (Protector not Controlled) ... 531
s. 37 (Exclusion of Equity) ... 531, *533*
s. 38 (Confirmation of Voidable Estates) ... 532
s. 39 (Enlargement of Base Fee) ... 531
s. 40 (Mode of Disposition) ... 522
s. 41 (Enrolment) ... 524
s. 42 (Consent, how given) ... 531
s. 44 (Consent Irrevocable) ... 531
s. 45 (Consent of Married Woman) ... 527
s. 46 (Enrolment of Consent) ... 532, 782, n.
s. 48 (Consent of Lord Chancellor) ... 530
s. 49 (Evidence of such Consent) ... 530
ss. 50—54 (Copyholds) ... 524, 532, 782, n., 787, n., 790, n.
ss. 56—69 (Bankrupt Tenant in Tail) ... 536
s. 71 (Entailed Money) ... 535, 536
s. 74 (Relation, Lack of Enrolled Deeds) ... 524
s. 77 (Assurances by Married Woman) ... 739, n.
s. 79 (Acknowledgment by Married Woman) ... 522
c. 106 (Inheritance), ss. 3, 4 ... *434*
4 & 5 Will. 4, c. 29 (Loans in Ireland) ... 797, 799
1 & 2 Vict. c. 110 (Judgments, &c.) ... 8, n.
5 & 6 Vict. c. 27 (Ecclesiastical Leases) ... 849, n.
c. 35 (Income Tax) ... 689, n.
c. 108 (Ecclesiastical Leases) ... 854, n.
7 & 8 Vict. c. 97 (Charity, Ireland) ... 872
8 Vict. c. 18 (Lands Clauses Act) ... 336, 461, n., 463, n., 478, n.
8 & 9 Vict. c. 106 (Law of Real Property Amendment Act) ... 217, 373, 399
s. 1 (Repeal) ... 399
s. 2 (Conveyance by Grant) ... 217, 373
s. 8 (Contingent Remainders) ... 399
13 & 14 Vict. c. 21, s. 4 (Act of Parliament, Definitions) ... 441, n., 481, n.
c. 28 (Peto's Act) ... 867, n.
15 & 16 Vict. c. 85 (Burials) ... 865, n.
16 & 17 Vict. c. 51 (Succession Duty) ... 186, 314, 402
c. 78 (Commissioners for Oaths), s. 2 ... 4, n.
c. 134 (Burials) ... 865, n.
18 & 19 Vict. c. 43 (Infants' Settlement Act) ... 143, 152, 213
c. 128 (Burials) ... 865, n.
20 & 21 Vict. c. 57 (Malins' Act) ... 132, 296
21 & 22 Vict. c. 27 (Ecclesiastical Leases) ... 855, n.
c. 94 (Copyhold Act), s. 33 ... 267
22 & 23 Vict. c. 35 (Lord St. Leonards' Act) ... 39, &c.
s. 10 (Release of Rentcharge) ... 39, 60, n., *403*
s. 13 (Sale under Power) ... *391*
s. 27 (Indemnity against Rents, &c.) ... 71, n.
s. 31 (Trustees' Indemnity) ... 272, *343*

PAGE
22 & 23 Vict. c. 35, s. 32 (Trust Investments) 256, 797, 799
23 & 24 Vict. c. 15 (Probate Duty) ..... 641, n.
c. 38 (Lord St. Leonards' Act) ..... 256, &c.
s. 10 (Cash under Control of Court) 259
s. 11 (Power for Trustees to Invest) 257, 797, 799
s. 12 (Investments by Trustees) 256, 258
c. 61 (Divorce Act) 316, 317
c. 83 (Infants' Settlement, Ireland) 152, 213
c. 124 (Ecclesiastical Commissioners) 505, 506
c. 145 (Lord Cranworth's Act) ..... 257, &c.
s. 8 (Renewal of Leases) 507
s. 25 (Trust Investments) 257, 260
s. 26 (Maintenance, &c.) *305*
24 Vict. c. 9 (Charity) 869
25 & 26 Vict. c. 89 (Companies Act, 1862) 868
26 & 27 Vict. c. 73 (India Stock) ..... 256, n.
c. 118 (Companies Clauses Act) ..... 262, n.
27 Vict. c. 13 (Charity) 869
27 & 28 Vict. c. 114 (Improvement of Land Act, 1864) ..... 261, &c.
s. 9 (Improvements) ..... 466, n.
s. 49 (Execution of Charges) ..... 456, n.
s. 60 (Investment of Trust Funds on Charges) *261*
s. 61 (Charge not an Incumbrance) ..... 267, n.
ss. 78, 79 (Railways, Canals, &c.) ..... 469, n., 473, n.
28 & 29 Vict. c. 78 (Mortgage Debentures), s. 40 ..... *261*
29 & 30 Vict. c. 42 (Life Assurance, Ireland) ..... 244, n.
c. 59 (Charity) 870
c. 122 (Metropolitan Commons Act) ..... 841, n.
30 & 31 Vict. c. 132, ss. 1, 2 (Trust Investments) 256, 800
c. 144 (Policies of Insurance Act) 245
31 & 32 Vict. c. 44 (Charity) 871
c. 114 (Ecclesiastical Leases) ..... 849, n.
32 & 33 Vict. c. 62 (Debtor's Act, 1869) 293
c. 71 (Bankruptcy Act, 1869) 321
c. 106, s. 16 (East India Stock) ..... 256, n.
c. 107 (Metropolitan Commons) ..... 842, n.
33 Vict. c. 14 (Naturalization Act) 161
c. 23 (Disability of Felons), s. 2 161
33 & 34 Vict. c. 5 (Apportionment) ..... 115, n., 281, 402
c. 20 (Mortgage Debentures), s. 4 261
c. 34 (Investment of Charity Funds) 269
c. 56 (Limited Owners Residences) ..... 467, n.
c. 93 (Married Women's Property) 132
c. 97 (Stamp Act, 1870) ..... 51, &c.
s. 8 (Several Matters) 239
ss. 124, 125, 126 (Settlements) *540*, *541*
Sched. (Bonds, &c.) *542*
(Presentations) ..... 848, n
(Releases) 51
(Settlements) ..... 127, n., *540*
34 Vict. c. 27 (Debenture Stock Act), s. 1 ..... *262*
34 & 35 Vict. c. 13 (Charity) 870
c. 47 (Metropolitan Board of Works Loans), s. 13 ..... 262, 798
c. 84 (Limited Owners Residences) ..... 467, n
35 & 36 Vict. c. 44 (Chancery Funds) ..... 257, 447, n
36 Vict. c. 12 (Custody of Infants), s. 2 ..... *110*
36 & 37 Vict. c. 32, s. 16 (East India Stock) ..... 256, n.
c. 66 (Judicature Act, 1873) ..... 78, n., &c.
s. 24 (5) (Stay of Proceedings) ..... 106, n.
s. 25 (3) (Impeachment of Waste) *388*
s. 25 (6) (Assignment of Chose in Action) ..... 78, n., 242
s. 34 (Chancery Division) 411
37 Vict. c. 3, s. 17 (East India Stock) ..... 256, n.
37 & 38 Vict. c. 37 (Appointments) 299, 300
c. 57 (Statute of Limitations) 537
c. 59 (Married Women's Property) 132

PAGE
37 & 38 Vict. c. 62 (Infants' Relief Act), s. 2 149
c. 78 (Vendor and Purchaser Act, 1874) ..... 14, &c.
s. 2 (Evidence by Recitals) 384
s. 3 (Title to Leaseholds) 278
s. 6 (Bare Trustee) ..... 141, n.
s. 8 (Non-registration of Wills in Middlesex or Yorkshire) *14*
38 & 39 Vict. c. 77, s. 30 (Paymaster-General) 257
c. 83 (Local Loans) 262, 263
s. 21 (Stock Certificates) *263*
s. 27 (Nominal Debentures on) *262*
c. 87 (Land Titles and Transfer Act, 1875) ..... 1, n.
39 & 40 Vict. c. 56 (Commons Act, 1876) ..... 842, n.
40 & 41 Vict. c. 13 (Customs and Inland Revenue), s. 13 ..... 848, n.
c. 18 (Settled Estates Act, 1877) ..... 127, n., 295, 437
c. 19 (Matrimonial Causes Act) 317
c. 31 (Reservoirs and Water Supply) ..... 468, n., 469, n., 473, n.
c. 33 (Contingent Remainders) *399*
c. 35 (Metropolitan Open Spaces) ..... 842, n.
41 & 42 Vict. c. 31 (Bills of Sale Act, 1878) ..... 115, n., 185, 241
c. 56 (Commons Expenses Act, 1878) ..... 843, n.
c. 71 (Metropolitan Open Spaces) 842
42 & 43 Vict. c. 60, s. 18 (East India Stock) ..... 256, n.
43 & 44 Vict. c. 8 (Isle of Man Loans Act), s. 7 263
44 & 45 Vict. c. 12 (Customs and Inland Revenue Act, 1881) 186
c. 34 (Metropolitan Open Spaces) ..... 842, n.
c. 41 (Conveyancing, &c., Act, 1881) ..... 49, &c.
s. 2 (Definitions) ..... 221, 228, n.
s. 7 (Implied Covenants for Title) 194, *221*, 248
s. 14 (Relief against Forfeiture) ..... 860, n.
s. 17 (Consolidation of Mortgages) ..... 268, n.
s. 30 (Devolution of Trust Estates) ..... 657, n.
s. 31 (Appointment of Trustees, &c.) *339*
s. 35 (Powers of Trustees for Sale) ..... *225*, 662, n.
s. 36 (Trustees' Receipts) *335*
s. 37 (Power to Compound, &c.) 49, *356*
s. 39 (Restraint on Anticipation) 297
s. 42 (Trustees' Powers of Management) ... 228, 375, 694, n.
s. 43 (Maintenance, &c.) *304*
s. 44 (Rentcharges, &c.) ..... 386, 694, n.
s. 50 (Conveyance to Self) 104
s. 52 (Release of Powers) ..... *58*, n.
s. 56 (Payment to Solicitor) 336
s. 65 (Enlargement of Long Terms) ..... 461, n.
s. 71 (Repeals) 283
45 & 46 Vict. c. 38 (Settled Land Act, 1882) ..... 127, &c.
s. 1 (Title, Commencement, Extent) *438*, *439*
s. 2 (Definitions) ..... 127, n., *439 et seq.*
s. 3 (Powers of Sale, &c.) *447*, *448*
s. 4 (Regulations as to Sales, &c.) *449*
s. 5 (Special Powers) *450*
s. 6 (Leases) ..... 394, *450*, 706, n.
ss. 7, 8, 9 (Regulations as to Leases) 450
s. 10 (Variation of Leases) *451*
s. 11 (Mining Rent) ..... *452*, 706, n.
s. 12 (Special Leasing Powers) *453*
s. 13 (Surrenders) *454*
s. 14 (Copyholds) *455*
s. 15 (Mansion House, &c.) *455*, 707
ss. 16, 17, 18 (Incidental Powers) 456
s. 19 (Undivided Shares) 457
s. 20 (Conveyance) 411, *457*
s. 21 (Capital Moneys) ..... *458 et seq.*
ss. 22, 23 (Investment) *463*, *465*
s. 24 (Settlement of Lands Purchased, &c.) ..... 283, n., *465*
s. 25 (Improvements) ..... *466 et seq.*

PAGE

45 & 46 Vict. c. 38, s. 26 (Scheme for Improvement) *471*
s. 27 (Concurrence in Improvements)..... *472*
s. 28 (Obligation to Maintain, Insure, &c.)..... 390, *473*
s. 29 (Protection as to Waste) 390, *397*, *474*
s. 30 (Extension of Improvement of Land Act, 1864)... *475*
s. 31 (Contracts by Tenant for Life) *475*
ss. 32, 33, 34 (Application of Moneys)..... *476*, *477*, *478*
s. 35 (Sale of Timber)..... 478
s. 36 (Recovery of Land) 479
s. 37 (Heirlooms) *479*
s. 38 (Appointment of Trustees by Court) *518*
s. 39 (Number of Trustees to Act) *518*
s. 40 (Trustees' Receipts) *519*
s. 41 (Protection of each Trustee) *519*
s. 42 (Protection of Trustees Generally)..... *520*
s. 43 (Reimbursement) *520*
s. 44 (Reference to Court)..... *481*
s. 45 (Notice to Trustees)..... *481*, 706, n.
ss. 46—49 (Court, Land Commissioners, &c.) 485, 486, 842, n.
s. 50 (Powers not Assignable, &c.) *486*
s. 51 (Prohibition against Exercise)..... *487*, 504
s. 52 (Forfeiture) *488*, 504
s. 53 (Tenant for Life a Trustee)..... *488*, 709
s. 54 (Protection of Purchasers) *489*
s. 55 (Exercise of Powers) *489*
s. 56 (Saving for other Powers)..... *489*
s. 57 (Additional Powers) *491*
s. 58 (Enumeration of Limited Owners) ..... *491 et seq.*
ss. 59, 60 (Infants) *494*
s. 61 (Married Women) *495*
s. 62 (Lunatics) *496*
s. 63 (Trusts for Sale) ..... *228*, 660, n.
s. 64 (Repeals) *497*
s. 65 (Ireland) *498*
c. 39 (Conveyancing Act, 1882) ..... 341, 489, n.
s. 3 (Constructive Notice)..... 489, n.
s. 5 (Separate Sets of Trustees) *341*
c. 43 (Bills of Sale Act, 1882), s. 3..... 185
c. 75 (Married Women's Property Act, 1882)..... 29, &c.
s. 1 (Holding of Property)..... 104, 113, n., 133, 185, 810, n.
s. 2 (Marriage since Act) 29, 136, 321
s. 3 (Loans to Husband)..... 136
s. 4 (General Powers) *136*
s. 5 (Marriage before Act) 29, 104, 136, 321
s. 6 (Stock belonging to Married Woman)..... 137
s. 7 (Transfer of Stock to Married Woman) 137
s. 8 (Investments in Joint Names) 137
s. 9 (Investments in Joint Names) 137
s. 10 (Fraudulent Investments)..... 137
s. 11 (Policies of Assurance) 138
s. 12 (Remedies) 139
s. 13 (Antenuptial Debts) 139
s. 14 (Husband's Liability for Debts) 140, 223
ss. 15, 16, 17 (Legal Proceedings)..... 140, 223
s. 18 (Married Woman Executrix or Trustee) 140
s. 19 (Restraint on Anticipation) ..... 134, n., 141, *184*
s. 21 (Maintenance of Children) ..... 417, n.
s. 24 (Executrix, &c) ..... 810, n.
46 & 47 Vict. c. 52 (Bankruptcy Act, 1883)..... 127, n., &c.
s. 18 (Voluntary Settlement)..... *181*
s. 20 (Vesting of Property) 159
s. 29 (Fraudulent Settlements)..... 185
s. 30 (Discharge of Bankrupt)..... 183, n.
s. 44 (Property Vesting in Trustee) ..... *160*, 242, 243, 249, 641, n., 804, n.

PAGE

46 & 47 Vict. c. 52, s. 47 (Avoidance of Voluntary Settlements) 127, n., 181, 183, 321
s. 56 (Bankrupt Tenant in Tail) ... 536
s. 61 (Agricultural Holdings Act), s. 29 ... *470*
47 & 48 Vict. c. 18 (Settled Land Act, 1884) ... 231, &c.
ss. 1, 2, 3 (Title, Interpretation, &c.) ... *439*
s 4 (Fines) ... *444*
s. 5 (Notices) ... *482*, 706, n.
s. 6 (Consent of Tenants for Life) ... *231*, *490*
s. 8 (Curtesy) ... *441*, 493, n.
c. 54 (Yorkshire Registries Act, 1884) ... 9 *et seq.*
s. 4 (Mode of Registration) ... 9
s. 6 (Memorials) ... 9
s. 9 (Production of Deeds, &c.) ... 10
s. 11 (Notice of Improved Will) ... 11
s. 14 (Priority of Assurances and Wills) ... 12
s. 15 (Notices by Registration) ... 13, 17, n.
s. 16 (Tacking) ... 13
s. 17 (Derivative Title) ... 13
s. 18 (Mode of Registration) ... *13*
s. 19 (Searches) ... 14
s. 20 (Official Searches) ... 14
s. 21 (Record and Certificates of Search) ... 14
s. 22 (Certified Copies, &c.) ... *14*
s. 23 (Protection of Solicitors, Trustees, &c.) ... 14
s. 27 (Unstamped Instruments) ... *14*
ss. 28, 29, 30 (Copyholds, &c.) ... 14
48 & 49 Vict. c. 26 (Yorkshire Registries) ... 11 *et seq.*
s. 4 (Priority) ... 12
s. 5 (Notice by Registration) ... 13, 17, n.
s. 10 (Caveats) ... 11
c. 72 (Housing of Working Classes), s. 11 ... 449, n., 468, n., *470*
49 Vict. c. 22 (Metropolitan Police Fund) ... 798
50 & 51 Vict. c. 16 (Local Loans) ... 263
c. 30 (Settled Lands Act, 1887) ... 267, &c.
s. 1 (Determinable Charges) ... *460*
s. 2 (Improvements) ... *474*
s. 3 (Title, Construction, &c.) ... *439*
c. 45 (Metropolitan Police Fund) ... 798
c. 73 (Copyhold Act) ... 267, &c.
s. 23 (Enfranchisement) ... 267, 456, n.
s. 45 (Devolution of Trust Estates) ... 657, n.
51 Vict. c. 5 (Oude, &c., Railway Purchase Act) ... 256, n.
c. 8 (Customs and Inland Revenue Act, 1888) ... 186, 641, n., 764, n.
51 & 52 Vict c. 41 (Local Government Act, 1888) ... 798, n., 841, n.
c. 42 (Mortmain and Charitable Uses Act, 1888) ... 269, n., *867 et seq.*
c. 59 (Trustee Act, 1888) ... 227, &c.
s. 2 (Receipt of Money by Solicitor, &c.) ... 273
s. 3 (Depreciatory Conditions of Sale) ... *227*, 662, n.
s. 4 (Loans by Trustees) ... *274*
s. 5 (Liability for Loss) ... 283
s. 6 (Trustees' Indemnity) ... 346
s. 7 (Fire Insurance) ... *398*
s. 8 (Limitation of Liability) ... *355*
s. 9 (Mortgages of Long Terms) ... *265*
s. 10 (Renewal of Leases) ... 505, *508*
s. 11 (Fines or Renewals) ... 505, *508*
s. 12 (Retrospective Operation) ... 274
52 & 53 Vict. c. 30 (Board of Agriculture Act, 1889) ... 842, n.
c. 32 (Trust Investment Act, 1889) ... *794 et seq.*
c. 36 (Settled Land Act, 1889), s. 2 ... 706, n.

ADDENDA ET CORRIGENDA.

Page 17, line 29. *Add:* "See also on the rule that where there has been notice, priority is not gained by a subsequent incumbrancer who is the first to register, *Punchard* v. *Tomkins*, 31 W. R. 286."

,, 29, line 11. *For* "C. P.," *read* "P. C."

,, 30, note (*d*). The case of *Re Bown* is also reported in 27 Ch. D. 411, see p. 295 of this volume.

,, 93; line 28. *Before the words* "by a wife," *insert the words* "a release."

,, 99, marginal note. *For* "on," *read* "or."

,, 133, note (*a*). *Add:* "But see *Re Dixon, Byram* v. *Tull*, 42 Ch. D. 306."

,, 161, line 14. *Dele* "Naturalization Act."

,, 213, two lines from end. *After the words* "Infants Settlement Act," *read thus* "(18 & 19 Vict. c. 43) extended to Ireland by the Stat. 23 & 24 Vict. c. 83."

,, 291, line 4. *For* "married woman," *read* "woman who has married or whose title has accrued since the commencement of the Act."

,, 304, line 39. *Add:* "See also *Re Bacon's Settlement Trusts*, 42 Ch. D. 559."

,, 320, line 29. *Time for Ascertaining Next of Kin.*] The decisions in *Druitt* v. *Seaward*, and *Re Bradley*, were not followed by Kay, J., in the recent case of *Clarke* v. *Hayne*, 42 Ch. D. 529. In that case a settlement of personalty contained an ultimate trust for "the person or persons who would under the Statutes of Distribution be entitled thereto, in case the wife having survived her husband were to die possessed thereof, and intestate;" the wife died in the husband's lifetime; it was held that those persons were entitled to take who would have been entitled if the wife had died intestate immediately after the husband.

,, 325, line 20. *Covenant to Settle Wife's After-acquired Property.*] A covenant by a husband in a settlement made before the Married Women's Property Act, 1882, to settle the wife's after-acquired property extends to property coming to the husband in her right after her death, *Fisher* v. *Shirley*, W. N. 1889, p. 189.

,, 398, line 15. *Add:* "As to the right of an equitable tenant for life to the custody of the title deeds, see *Re Burnaby's Settled Estates*, 42 Ch. D. 621."

,, 402, four lines from bottom. *Add:* "It would seem that no words, however explicit, would discharge from liability to income tax a rentcharge limited by a settlement for *valuable* consideration: see *post*, p. 689, note (*c*)."

Page 463, note (*y*). The decision in *Re Beck*, so far as relates to the allowance of costs of the concurrence in a sale of settled lands of the mortgagees of the tenant for life cannot be regarded as of general application ; see the observations of Chitty, J., in *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, affirmed on appeal, 41 Ch. D. 375.

Ibid. *Add at end of note* :—"Trustees of a settlement who, during the minority of a tenant in tail, had contracted to sell an unoccupied farm, part of the settled lands, were held not to have power to raise money to work the farm until completion of the purchase : *Round* v. *Turner*, W. N. 1889, p. 38."

,, 475, note (*y*). *Add :* "Improvements within the Improvement of Land Act, 1864, are not necessarily within sect. 25 of the Settled Land Act, 1882 : see *Re Newton's Settled Estates*, W. N. 1889, p. 201."

,, 524. *Add at end of page* :—"An enfranchisement of copyholds (not under the Copyhold Acts) to a tenant in tail in possession has the effect of barring the entail : *Ex parte School Board for London, Re Hart*, 41 Ch. D. 547."

,, 526, line 15. *For* "55," *read* "54."

,, 636, line 16. *Add :* "As to the effect of a disentailing deed upon capital monies, the proceeds of sale of entailed estates, where the deed contains no reference to monies : see *Re Skillett's Trusts*, 15 L. R., Ir. 1."

,, 811, note (*f*). *For* "Freem. 28," *read* "Freem. 23."

,, 812, note (*f*), *ad fin.* *Assent of Executor.*] Assent to a legacy does not constitute the executor a trustee for the legatee, so as to preclude him from availing himself of the Statute of Limitations : *Re Rowe, Jacobs* v. *Hind*, W. N. 1889, p. 161. See also as to what will amount to an assent to a bequest of leaseholds, *Re Charik*, W. N. 1889, p. 91.

Jarman and Bythewood's

PRECEDENTS IN CONVEYANCING

REGISTRY (*a*).

PRELIMINARY REMARKS.

	PAGE		PAGE
The Middlesex Registry	2	*Points decided upon the Registry Acts*	15
The Yorkshire Registry	9		
Non-Registration of Wills	14		

Memorials under the Registry Acts.

By various Acts of Parliament, memorials of deeds affecting lands in the counties of Middlesex and York, and the county of the town of Kingston-

(*a*) By the Land Titles and Transfer Act, 1875 (38 & 39 Vict. c. 87), a general land registry for England was established, with the view of simplifying the title to land, and facilitating the transfer of land. Under that Act, persons entitled to the fee simple of land, either as beneficial owners, or as trustees, might be registered; but tenants for life and other limited owners were not entitled to be registered, but were left to be protected by unregistered trusts, or by means of cautions, inhibitions, &c. The provisions of this Act have not as yet had any great practical effect; and, so far, titles thus registered, and conveyances of registered land, other than in Middlesex and Yorkshire, are not frequently met with. A Bill to amend and extend the provisions of this Act, whereby it is proposed to make the registration of titles compulsory, has been before Parliament for the last two sessions, and has been re-introduced in the present session; but it is as yet uncertain whether it will pass, or, even if so, what form it will ultimately assume. Under these circumstances, it seems premature and useless, at the present time, to discuss the question of the registration of land, except as regards the Local Registries.

Memorials under the Registry Acts.

upon-Hull, are for certain purposes required to be registered (*b*).

Middlesex Registry.

Middlesex Registry.]—With regard to the county of Middlesex, the stat. 7 Ann. c. 20, s. 1, enacts,—

Stat. 7 Ann. c. 20.

Memorials of deeds and wills affecting lands in Middlesex to be registered.

"That a memorial of all deeds and conveyances which, from and after the 29th September, 1709, shall be made and executed, and of all wills and devises in writing, made or to be made and published, where the devisor or testatrix shall die after the said 29th September, of or concerning and whereby any honors, manors, lands, tenements, or hereditaments, in the said county may be any way affected in law or equity, may be registered in such manner as is hereinafter directed (*c*); and that every such deed or conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration (*d*), unless such memorial thereof be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. And that every such devise by will shall be adjudged fraudulent and

---

Bedford Level.

(*b*) By the Bedford Level Act, 15 Car. 2, c. 17, all conveyances and charges, except leases for seven years, of the ninety-five thousand acres therein comprised, are required to be registered. As to the effect of such registry, see *Willis* v. *Brown*, 10 Sim. 127. The other Acts relating to the Bedford Level, are stat. 11 Geo. 3, c. 78; 36 Geo. 3, c. 73; 4 Geo. 4, c. 46. See *Hodson* v. *Sharpe*, 10 East, 350. The practice is to register the instrument at full length. No authentication is required, and the registry does not include wills.

Practice of the registry-office in regard to the contents of the memorial.

(*c*) More of the deed is usually set forth in the memorial than the Act requires; indeed, the practice of the registry-office in many respects is not strictly conformable to the requisitions of the Act. The discrepancies have been pointed out by Lord St. Leonards, see Sugd. V. & P. 731. Where the practice requires something which the Act does not, there is less reason for objection (if a compliance with it in the particular case be feasible), than where it falls short of the legislative requisition; in which case, a memorial received at the office may yet be unavailing for the purposes of the Act; for it is scarcely necessary to observe, that the reception of the memorial is by no means conclusive evidence of its sufficiency, though, in points admitting of doubt, it is probable that the Courts would be influenced by the practice. See *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

Registry not material as against grantor, &c.

(*d*) Registry is of course not material to perfect a title as against the grantor himself, or his trustee in bankruptcy, though their appointment is duly registered: *Jones* v. *Gibbon*, 9 Ves. 407; *Ex parte Coles, Re Rucker*, 1 Dea. & C. 100; 1 Mon. & A. 481; *Sumpter* v. *Cooper*, 2 B. & Ad. 223; *Hodson* v. *Sharpe*, 10 East, 350.

void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered at such times and in such manner as is hereinafter directed."

Memorials under the Registry Acts.

Middlesex.

Sects. 2, 3, and 4, relate to the appointment and duties of the registrars : see 24 Geo. 2, c. 4.

Sect. 5. "That all and every memorials so to be entered and registered, shall be put into writing in vellum or parchment (*e*), and brought to the said office of deeds ; and, in case of deeds and conveyances, shall be under the hand (*f*) and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians, or trustees (*g*), attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance (*h*) ; which witness shall upon

Memorials to be written on parchment ; to be under hand and seal and be proved as herein mentioned.

(*e*) A lithographed memorial is a memorial "put into writing" within the meaning of this section : *Reg.* v. *Registrar of Middlesex*, 7 Q. B. 156.

Lithographed memorial.

(*f*) When the instrument is a lease by a corporation aggregate, it seems to be the practice to require the lessee to execute the lease, on the ground that the affixing of the corporate seal to the memorial would not satisfy the words "*hand and seal.*" (Rigge, 106.) This is a mere crotchet. The word "hand" is incapable of any other than the metaphorical meaning of signature, and the seal of a corporation is its signature : *Doe* d. *Cutlers' Co.* v. *Hogg*, 1 B. & P., N. R. 306.

Lease by corporation.

(*g*) The Act evidently only requires the heirs, executors, &c., of the party, to sign and seal the *memorial ;* but Mr. Rigge (on Registry, p. 74) suggests that, from the indistinctness of the clause, the instrument to be registered should, notwithstanding it is already sufficiently executed for general legal purposes, be signed and sealed by the party requiring the registry, as if he were a party in his own right. The clause, however, seems to be sufficiently definite : it simply requires the memorial to be thus executed, and its execution to be proved by one of the witnesses to the deed, which requisition cannot be considered as implying that the deed and memorial shall be executed by the same parties. The practice, however, of making the heir, &c., execute the deed as well as the memorial (which the editor understands is not invariably insisted on), can do no harm, provided the witness deposing to his execution of the deed and memorial is one of the attesting witnesses to the execution of the deed by one of the original parties ; but this is material to be attended to, for, if the construction of the Act contended for in the preceding observations be correct, it would not be sufficient that such witness had attested the execution by the heir, &c., requiring the memorial.

Who must sign the memorial.

(*h*) It has been recently held that it is not necessary that one of the witnesses attesting the memorial should be a witness to the execution of the deed by the grantor, but that it is sufficient if he

Whether proof of execution by *grantee* be sufficient.

Memorials under the Registry Acts.

Middlesex.

his oath, before one of the said registers or masters, or before a master in Chancery, ordinary or extraordinary, prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial; and in case of wills, the memorial shall be under the hand and seal of some or one of the devisees, his or their heirs, executors, or administrators, guardians, or trustees, attested by two witnesses, one whereof shall, upon his oath, before the said registers or masters, or before such master in Chancery as aforesaid, prove the signing and sealing of such memorial, (which respective oaths the said registers or masters, and masters in Chancery, are hereby empowered to administer), and shall endorse a certificate thereof on every such memorial, and sign the same" (*i*).

Memorial of wills.

Contents of memorial.

Sect. 6. "That every memorial of any deed, conveyance, or will, shall contain the day of the month and the year when such deed, conveyance, or will, bears date, and the names and additions of all the parties to such deed or conveyance, and of the devisor or testatrix of such will, and of all the witnesses to such deed, conveyance, or will, and the places of their abode, and shall express or mention the honors, manors, lands, tenements, and hereditaments, contained in such deed, conveyance, or will, and the names of all the parishes, townships, hamlets, precincts, or extra-parochial places within the said county, where any such honors, &c. are lying, that are given, granted, conveyed, devised, or any ways affected or charged by any such deed, conveyance, or will, in such manner as the same are expressed or mentioned in such deed, conveyance, or will, or to the

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has witnessed the execution by the grantee: *Reg.* v. *Lord Truro*, 21 Q. B. D. 555. A memorial of an assignment of a lease signed by the assignee is good secondary evidence of the assignment against those claiming under the assignee: *Wollaston* v. *Hakewell*, 3 Scott, N. R., 593; and an examined copy of the memorial is admissible for that purpose: *Molton* v. *Harris*, 2 Esp. 549; *Collins* v. *Maule*, 8 C. & P. 502; *Doe* d. *Ubele* v. *Killnes*, 2 Ib. 289.

As to re-execution for registry.

A suggestion by Mr. Rigge (p. 77), that "if a considerable time has elapsed from the date of a deed intended to be registered, and all the witnesses are dead, or the testimony of them not easily obtained, the re-execution of such deed by any one of the parties in the presence of a new witness will be sufficient to effectuate the registry," appears to have been sometimes acted upon. It is scarcely necessary to say that such a proceeding and registry would be a mere nullity: *Essex* v. *Baugh*, 1 Y. & C. C. C. 620; *Jack* v. *Armstrong*, 1 H. & Br. 727; *Hobhouse* v. *Hamilton*, 1 Sch. & L. 207. See Sugd. V. & P. 730.

(*i*) A London Commissioner to administer oaths in Chancery appointed under the stat. 16 & 17 Vict. c. 78, sect. 2, has power to administer the oath required by the above Act, and he need not

same effect (*k*). And that every such deed, conveyance, and will, or probate of the same, of which such memorial is so to be registered as aforesaid, shall be produced to the said registers or masters at the time of entering such memorial, who shall endorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time, on which such memorial is so entered or registered, expressing also in what book, page, and number, the same is entered; and that the said registers or masters shall sign the said certificate when so indorsed, which certificate shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever." (The clause then directs the manner of keeping the register.)

Memorials under the Registry Acts.

Middlesex.

Sect. 7. "That where there are more writings than one for making and perfecting any conveyance or security, which do name, mention, or any ways affect or concern the same honors, &c., it shall be a sufficient memorial and register thereof, if all the said honors, &c., and the parishes, townships, hamlets, or extra-parochial places wherein the same lie, be only once named or mentioned in the memorial or register of any one of the deeds or writings, made for the perfecting of such conveyance or security; and that the dates of the rest of the said deeds or writings relating to the said conveyance or security, with the names and additions of the parties and witnesses, and the places of their abodes, be only set down in the memorials and registers of the same, with a reference to the deed or writing whereof the memorial is so registered, that contains or expresses the parcels mentioned in all the said deeds, and directions how to find the registering the same" (*l*.)

Where there are more writings than one—description of parcels in one, sufficient.

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require a written affidavit of the witness: *Reg.* v. *Lord Truro*, 35 W. R. 808.

(*k*) Sometimes the parcels are stated in the reciting part of the deed, in which case, of course, the description in the memorial must be taken from the recital; and generally, every material word of description applicable to the premises in respect of which the registry is made, in whatever part of the deed it may be found, should be transferred to the memorial, but not of course with repetition, or as to any general description which is included in one more particular. If the deed describes the parcels by reference to a description contained in another deed, it will be sufficient to state in the memorial the referential description contained in the deed which is to be registered, whether the other deed has been registered or not. This will satisfy both the words and the spirit of the Act. If the former deed containing the description has not been registered, and the grantee under the new deed derives title through it, *that* defect may expose him to danger.

As to describing the parcels.

(*l*) This clause only relates to cases where there are several

Whether it is

Memorials under the Registry Acts.

Middlesex.

Time allowed for registering wills.

Sect. 8. "That all memorials of wills that shall be registered in manner as aforesaid, within the space of six months after the death of every respective devisor or testatrix, dying within the kingdom of Great Britain, or within the space of three years after the death of every respective devisor or testatrix, dying upon the sea or beyond the seas, shall be as valid against subsequent purchasers, as if the same had been registered immediately after the death of such respective devisor or testatrix" (*m*).

In case of concealment or contesting the will.

Sect. 9. "That in case the devisee, or person or persons interested in the honors, &c. devised by any such will as aforesaid, by reason of the concealment or suppression, or contesting such will, or other inevitable difficulty, without his, her, or their wilful neglect and default, shall be disabled to exhibit a memorial for the registry thereof within the respective times hereinbefore limited, and that a memorial shall be entered in the said office of such contest or other impediment within the space of two years after the death of such devisor or testatrix, who shall die within the kingdom of Great Britain, or within the space of four years next after the decease of such person who shall die upon the sea or beyond the seas, then and in such case the registry of the memorial of such will within the space of six months next after his, her, or their attainment of such will, or a probate thereof, or removal of the impediment," shall be a sufficient registry (*n*).

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sufficient to refer to former memorialised deed containing a description of the parcels.

instruments intended to operate as one conveyance, and cannot make it sufficient, in the registry of an assignment of a lease (as is sometimes the practice), to refer to the parcels in the lease, provided it has been previously memorialised. Where the deed itself describes the parcels by reference only, a description by reference in the memorial is generally considered sufficient: see last note.

(*m*) The non-registration of wills is cured in certain cases by sect. 8 of the Vendor and Purchaser Act, 1874: see *post*, p. 14.

Lost will.

(*n*) It was held under the similar enactment in the East Riding Registry Act (6 Anne, c. 35), that no protection was given to devisees under a will which had not been discovered by them for more than six months after the testator's death, and where, consequently, no memorial of the will or of the impediment preventing its registration had been registered within the time prescribed by the Act: *Chadwick* v. *Turner*, L. R. 1 Ch. 310.

Where leaseholds are bequeathed by will, and the executor gives his assent in writing, the legatee's title must be protected by registering the *assent* of the executor. If the assent is merely verbal, registry is, of course, out of the question (see *Williams* v. *Sorrell*, 8 Jur. 389); but a legatee of leaseholds cannot be advised to rest satisfied without written evidence of assent. Registering

Memorials under the Registry Acts.

Middlesex.

Sect. 10. "That, in case of any concealment or suppression of any will or devise, any purchaser or purchasers shall not be disturbed or defeated in his or their purchase, unless the will be actually registered within five years after the death of the devisor or testatrix."

Protection to purchasers against concealed will.

Certificate of the discharge of mortgages to be registered.

Sect. 17. "That, in case of mortgages, whereof memorials shall be entered in the said register office pursuant to this act, if at any time afterwards a certificate shall be brought to the said registers or masters, signed by the mortgagee or mortgagees in such mortgage, his, her, or their executors, administrators, or assigns, and attested by two witnesses, whereby it shall appear that all monies due upon such mortgage have been paid or satisfied in discharge thereof, which witnesses shall upon their oaths before the said registers or masters, or before a master in Chancery, ordinary or or extraordinary, (who are hereby respectively empowered to administer such oath), prove such monies to be satisfied or paid accordingly, and that they saw such certificate signed by the said mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, that then and in every such case the said registers or masters shall make an entry in the margents of the said register books against the register of the memorial of such mortgage, that such mortgage was satisfied and discharged according to such certificate, to which the same entry shall refer, and shall after file such certificate, to remain upon record in the said register office."

Act not to extend to copyholds, &c.

Sect. 18. "That this act shall not extend to any copyhold estates (*o*), or to any leases at a rack-rent or to any lease not exceeding one-and-twenty years, where the actual possession and occupation go either along with the lease (*p*), or to any of the chambers in Serjeants' Inn (*q*), the Inns of Court, or Inns of Chancery."

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the will, or, where there is no will, the letters of administration, is not necessary.

(*o*) It is usual, however, and seems to be a prudent precaution, to register leases of copyholds, granted by license or custom for more than twenty-one years.

As to the registration of assignments of leases.

(*p*) Where the assignment is by way of mortgage, in which case the "possession and occupation" generally do not "go along with the lease," the lease and assignment, though the lease does not exceed twenty-one years, should be registered. In other cases, *i.e.*, where the possession and occupation do accompany the lease, there seems to be no pretence for requiring the registry, although the lease be assigned for a valuable consideration. See *Bailey* v. *Fermor*, 9 Price, 268.

London not within the Act.

(*q*) It has been suggested that this exception of a place within the city of London shows an intention to include the city within

Memorials under the Registry Acts.

Middlesex.

Judgments, statutes, and recognizances (other than those of the crown) to be registered.

Sect. 19. "That no judgment (*r*), statute, or recognizance, (other than such as shall be entered in the name and upon the proper account of her Majesty, her heirs and successors), shall affect or bind any honors, &c. in Middlesex, but only from the time that a memorial of such judgment, &c. shall be entered at the said register office, expressing and containing, in case of such judgment, the names of the plaintiffs, and the names, additions, and places of abode (if any such be in such judgment) of the defendants, the sums thereby recovered, and the time of the signing thereof; and in case of statutes and recognizances expressing and containing the date of such statute or recognizance, the names, additions, and places of abode of the cognizors and cognizees therein, and for what sums, and before whom, the same were acknowledged; and that, in order to the making an entry of such memorials of judgments, statutes, and recognizances, as aforesaid, the party and parties desiring the same shall produce to and leave with the said registers or masters, to be filed in the said public or register office, a memorial of such judgment, statute, or recognizance, signed by the proper officer, or his deputy, who shall sign such judgment in the same office, or by the proper officer in whose office such statute or recognizance shall be inrolled, together with an affidavit, sworn before one of the judges at Westminster, or a master in Chancery, that such memorial was duly signed by the officer whose name shall appear to be thereunto set; which memorial such respective officer is hereby required to give such plaintiff or plaintiffs, cognizee or cognizees, or his, her, or their executors, or administrators, or attornies, or any of them, he, she, or they, paying for the same the sum of one shilling."

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the operation of the Act. (Rigge, 88, n.) As the Act only mentions the county of Middlesex, it is clear that no such implication can be made from a mere saving.

Judgments, decrees, &c.

(*r*) Judgments must still be registered under the Registry Acts, in order to bind lands within their respective districts, notwithstanding the stat. 1 & 2 Vict. c. 110, establishing a general registry of judgments: see *Benham* v. *Keene*, 1 J. & H. 685; *Westbrook* v. *Blyth*, 3 E. & B. 737. But decrees and orders of Court, and rules of Court deriving effect from the stat. 1 & 2 Vict. c. 110, are not within the Registry Acts. As to the searches proper to be made for judgments, *vide ante*, Vol. I., pp. 100, *et seq.*

Glebe lands.

Glebe lands are not bound by the judgment, but by the delivery of the writ, and therefore registry of the judgment is not necessary in respect of such lands: *Cottle* v. *Warrington*, 2 Nev. & M. 227.

Order for foreclosure.

An order for foreclosure absolute is not a judgment within the meaning of this Act so as to require a memorial thereof to be entered at the Middlesex Registry Office: *Burroughes* v. *Holley*, 35 Ch. D. 123.

Sect. 20. "That the said register or master shall make an entry, and likewise, if required, give a certificate in writing under his hand, testified by two credible witnesses, of every such memorial of any judgment, statute, or recognizance, brought to him to be so registered as aforesaid, and therein mention the certain day on which such memorial is so registered or entered, expressing also in what book, page, and number, the same is entered."

Memorials under the Registry Acts.

Middlesex.

Registrar to give certificate.

Yorkshire Registry.]—By the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), the then existing Yorkshire Registries Acts (*s*) are repealed, and the law relating to the registration of deeds, wills, and other instruments affecting lands and hereditaments within the three Ridings of the county of York and the town of Kingston-upon-Hull is consolidated and amended. By this Act (sect. 31) three offices for the registration of deeds, &c., are established: at Northallerton, for the North Riding; at Beverley, for the East Riding; and at Wakefield, for the West Riding; at which offices assurances executed or made after the commencement of the Act (1st January, 1885), and wills of testators dying after that date may be registered: see sect. 4.

Yorkshire Registries Act, 1884.

Deeds, wills, and other assurances of land, with the following exceptions, may be registered by the enrolment of either memorials, or of the instruments at full length, at the option of the person registering the same. But a private Act is to be registered by enrolment of a Queen's Printers' copy, or by memorial; and a memorandum of charge, caveat, notice, or affidavit must be enrolled at full length: sect. 4.

Mode of registration.

By sect. 6 it is enacted, with regard to the enrolment of deeds and wills, as follows:—

"Except so far as may be otherwise expressly provided by this Act, or by any rules to be made under this Act, the memorials of

Memorials.

(*s*) The repealed statutes are, as to the West Riding, the 2 & 3 Anne, c. 4, and the 6 Anne, c. 20; as to the East Riding, the 6 Anne, c. 35; and as to the North Riding, the 8 Geo. 2, c. 6. The repeal is not to affect anything duly done or suffered, any right, privilege, priority, or preference acquired, or any liability, disqualification, &c., incurred under any enactment so repealed prior to the commencement of the Act.

Memorials under the Registry Acts.

Yorkshire.

all assurances or wills which are enrolled in the register under this Act shall be subject to the following regulations :—

(1.) In the case of a deed the memorial shall be under the hand and seal of some or one of the parties thereto, or of some or one of their or his heirs, executors, administrators, guardians, or trustees, and shall be attested by one or more witnesses, one of whom at least shall have been a witness to the execution of the deed, and shall contain—

(A.) The date of the deed :

(B.) The name and description of the residence and occupation of all the parties to the deed so far as set out therein :

(C.) The names and descriptions of the residences and occupations of all the witnesses to the execution of the deed so far as appears therein :

(D.) A description of all the lands affected by the deed within the riding, and the names of all the parishes wherein the same are situate, in such manner as the same are expressed or mentioned in such deed, or to the same effect :

(E.) The name and description of the residence and occupation of the person on whose behalf the memorial is to be registered.

(2.) In the case of a will the memorial shall be under the hand and seal of one of the trustees or executors of the said will, or of some one or more persons claiming an interest thereunder in some of the lands affected thereby within the riding, and shall be attested by one or more witnesses, and shall contain—

(A.) The date of the will :

(B.) The date of the death of the testator :

(C.) The name and description of the residence and occupation of the testator so far as set out in the will :

(D.) The names and descriptions of the residences and occupations of all the witnesses to such will so far as appears therein.

Production and endorsement of deeds and wills on registration.

No deed or will is to be registered unless the original of such deed, or the original or the probate of such will, is produced to the registrar at the time of registration : sect. 8. And the registrar is to endorse on the deed, or on the will or probate so produced, a certificate of registration : sect. 9.

Memorials under the Registry Acts.

Yorkshire.

Caveats.

By sect. 3 of the Amendment Act of 1885 (48 & 49 Vict. c. 26), sect. 10 of the principal Act relating to caveats is repealed without prejudice to caveats given before the commencement of the Amending Act, and it is thereby provided that a caveat may at any time be given by any person claiming to be interested in lands and registered, and such caveat is to remain in force for the time specified therein. And the section continues as follows:—

"Every such caveat shall be under the hand and seal of the person by whom it is given, and attested by one witness at the least, and shall contain—

(A.) The date on which it is given:

(B.) The name and description of the residence and occupation of the person by whom it is given:

(C.) The name and description of the residence and occupation of the person in whose favour it is written:

(D.) A statement of the time for which it is intended to remain in force:

(E.) A description of the lands to be affected by such caveat, and the names of all the parishes wherein the same are situate.

If within the time during which any caveat remains in force any assurance made or executed by the person by whom such caveat was given in favour of the person in whose favour such caveat was given, or his heirs, executors, administrators, or assigns, be duly registered under this Act, such assurance shall have priority as though it had been registered upon the date on which such caveat was registered; and such last-mentioned date shall be deemed to be the date of registration of the said assurance for all purposes, and shall be substituted in all certificates and other instruments for the date on which such assurance was actually presented for enrolment accordingly."

Notices of wills not proved.

No period is limited within which assurances must be registered, but sect. 11 of the principal Act provides that, if a person claiming under a will is unable to register the same within six months after the testator's death, he may within such period register a notice of the will. Such notice must be under his hand and seal, and must contain particulars being the same as the particulars (A), (B), and (C), required in the case of a memorial of a will; and also (D), the

Memorials under the Registry Acts.

Yorkshire.

name and description of the residence and occupation of the person by whom such notice is given, and (E), a description of all the lands affected by the will within the riding, and the names of all the parishes, &c., for and in such manner as the same are expressed or mentioned in the will or to the same effect. And the section continues as follows :—

"Where any such notice has been duly registered within the said period of six months, then if within two years after the death of the testator the will, which is the subject of such notice, is duly registered under this Act, such will shall have priority as though it had been registered upon the date on which such notice was registered, and such last-mentioned date shall be deemed to be the date of registration of the said will for all purposes, and shall be substituted in all certificates and other instruments for the date on which such will was actually registered."

Priority of assurances and wills.

With regard to priority of assurances, &c., the Act of 1884 (as amended by the stat. 48 & 49 Vict. c. 26) enacts as follows :—

Sect. 14. "Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof, and every will *entitled to be* registered under this Act shall have priority according to the date of the death of the testator if the date of registration thereof be within, or under this Act to be deemed to be within, a period of six months after the death of the testator, or according to the date of registration thereof, if such date of registration be not within, or under this Act to be deemed to be within, such period of six-months : Provided that nothing in this Act shall interfere with the priorities as between themselves of any assurances or wills the dates of registration of which may be identical. All priorities given by this Act shall have full effect in all courts except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud ; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims ; and any disposition of land or charge

48 & 49 Vict. c. 26, s. 4.

on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

Memorials under the Registry Acts.

Yorkshire.

Sect. 16. "In any case in which priority or protection might but for this Act have been given or allowed to any estate or interest in lands by reason or on the ground of such estate or interest being protected by or tacked to any legal or other estate or interest in such lands, no such priority or protection shall after the commencement of this Act be so given or allowed to any estate or interest in lands within the three ridings, except as against any estate or interest which shall have existed prior to such commencement, and full effect shall be given in every court to this present provision, although the party claiming under such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice."

Protection by legal estate and tacking not to be allowed.

By sect. 15 it was enacted that registration should be actual notice of the registered instrument, but this section is repealed by sect. 5 of the Amending Act of 1885 (48 & 49 Vict. c. 26).

Notice.

The effect of sect. 16 is that no priority or protection by legal estate or tacking is given or allowed after the commencement of the Act except as against any estate or interest existing prior to such commencement, although the person claiming the priority or protection is a purchaser for value without notice.

No protection by legal estate or tacking.

By sect. 17 the rights of persons claiming under registered instruments to relief are to be the same as the persons through whom they claim as against persons claiming under instruments of subsequent date, but having acquired priority by earlier registration.

Derivative title.

Sect. 18 enacts that,—

"Subject to the provisions of this Act, and any rules made thereunder, the registrar shall register all assurances, wills, and other instruments that may be entitled to be registered under this Act which, or memorials of which, may be presented to him for enrolment in the register in the order in which they are so presented, and shall make such entries as are required to be made under this Act or any rules made thereunder for the purposes of such registration.

Registration.

"Provided that all instruments or memorials which may be delivered through the post or otherwise at the office for the purpose of enrolment at any time when the office is closed, shall be deemed

Memorials under the Registry Acts.

Yorkshire.

to be presented for enrolment simultaneously at the time when the office next opens for the business of registration, and that subject as aforesaid all instruments or memorials sent through the post shall be deemed to be presented for enrolment at the time when they are actually delivered at the office in course of post."

Searches.

By sect. 19 any person may search the register, &c., and take copies thereof or extracts therefrom. And by sect. 20 any person may require an official search to be made by delivering a requisition requiring such search to be made, stating particulars as to the character of the search required to be made, &c.; and the registrar is to deliver to such person a certificate of the result of the search signed by him and sealed with the seal of the registry, and every such certificate is to be receivable in evidence. A record of the result of official searches is to be kept, and certificates duly signed and sealed are to be given to persons requiring the same, which certificates are to be receivable in evidence: sect. 21.

Certified copies, &c.

Sect. 22 provides that any person may require a certified copy or extract of any registered document or entry from the register, &c., duly signed and sealed, which is to be receivable as evidence: but nothing in the section is to dispense with production of any original document or with any proof which might otherwise be required. And sect. 23 protects solicitors, trustees, &c., from being answerable for loss, &c., arising from any error in a certificate or copy.

Unstamped instruments.

By sect. 27 the registrar need not register instruments not properly stamped.

Copyholds, &c., not within the Act.

Nothing in the Act is to extend to copyholds or to any lease not exceeding 21 years, or assignment accompanied by possession of such lease, or to assurances or wills relating to shares in companies, &c., or to Crown lands: sects. 28, 29, 30.

Non-Registration of Wills.]—By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 8, it is enacted that:—

Non-registration of will in Middlesex or Yorkshire

"Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or

mortgagee by the devisee or by some one deriving title under him, shall if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law."

Memorials under the Registry Acts.

Non-Registration of Wills.

If an assurance from the testator's heir-at-law is duly registered the title will be complete, if more than six months have elapsed from the testator's death, though a will be subsequently discovered: see *Chadwick* v. *Turner*, L. R. 1 Ch. 310 *ante*, p. 6, note (*n*).

cured in certain cases.

A registered assurance from the heir-at-law will not protect a purchaser or mortgagee who had at the time of such assurance notice of the existence of an unregistered will: see *Re Weir*, *Hollingworth* v. *Willing*, 58 L. T. 792.

Notice of unregistered will.

Points decided upon the Registry Acts.]—On the preceding statutes the following points have been decided:—That the registration of a deed creating a power does not dispense with the necessity of registering the appointment in exercise of the power: *Scrafton* v. *Quincey*, 2 Ves. sen. 413 (*t*); nor is the registration of an assignment of a lease a sufficient registration of the lease itself; for the Act requires the deed under which the party claims, with the witnesses' names to be registered: *Honeycomb* v. *Waldron*, 2 Str. 1064; *Williams* v. *Sorrell*, 4 Ves. 389.

Appointment.

Assignment of lease.

A clerical inaccuracy does not vitiate the memorial; and therefore, where, in the memorial of an assignment in trust for sale, the name of the trustee was written "Seden" instead of "Soden," and the habendum was stated to be to "Cowie" (who was the grantor), instead of "Soden," Sir W. *Grant*, M.R., held, that the variance did not affect the validity of the registry: *Wyatt* v. *Barwell*, 19 Ves. 435. It will be observed, that the inaccuracy in

Clerical error.

(*t*) See *Att.-Gen.* v. *Pickard*, 3 M. & W. 571. In *Scrafton* v. *Quincey*, the mesne incumbrancer took under the deed containing the power, and therefore, though it was not registered, that omission was not material.

Memorials under the Registry Acts.

this case was palpable upon the face of the memorial, and could not mislead.

Actual notice of unregistered deed, &c., binds in equity.

In regard to the *effect* of registry: in equity, a purchaser or mortgagee derives no advantage by the registration of his deed against a prior unregistered instrument, of which he has notice: *Cheval* v. *Nichols*, Str. 664; 2 Eq. Ab. 63; *Blades* v. *Blades*, 1 Eq. Ab. 358; *Hine* v. *Dodd*, 2 Atk. 275; *Le Neve* v. *Le Neve*, 3 Atk. 646; 1 Ves. sen. 64; *Sheldon* v. *Cox*, 2 Eden, 224; *Bushell* v. *Bushell*, 1 Sch. & L. 102; 2 Sch. & L. 532; *Forbes* v. *Deniston*, 4 B. P. C. 189; *Beatniff* v. *Smith*, 1 Eq. Ab. 357; *Davis* v. *Earl of Strathmore*, 16 Ves. 419; and see *Re Weir*, 58 L. T. 792; *ante*, p. 15. But constructive notice is not sufficient; there must be actual notice clearly proved. *Lis pendens* is not such notice; nor will suspicion of notice justify the Court in breaking in upon an Act of Parliament. "It must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and, knowing that, registered in order to defraud them of that title he knew at the time was in them:" *Jolland* v. *Stainbridge*, 3 Ves. 478; see also *Irons* v. *Kidwell*, cit. 1 Ves. sen. 69; *Hine* v. *Dodd*, 2 Atk. 275; *Wyatt* v. *Barwell*, 19 Ves. 435; *Wallace* v. *Marquis of Donegal*, 1 Dr. & W. 461. But distinct notice to an agent or trustee is actual notice to the principal, and has been held sufficient: *Le Neve* v. *Le Neve*, 1 Ves. sen. 68; *Sheldon* v. *Cox*, 2 Eden, 228; *Tunstall* v. *Trappes*, 3 Sim. 301. The entire equitable doctrine of notice is founded on the imputation of fraud; and, after the Courts have once admitted the notion of "constructive fraud" for the purpose of defeating a title, to attempt a distinction in the particular case of the Registry Acts seems not only absurd but impracticable. Of course, if the purchaser or incumbrancer had no notice of a prior unregistered title when he took his conveyance or security, he may, after notice, protect himself: see *Essex* v. *Baugh*, 1 Y. & C. C. C. 120.

What is actual notice for the purpose.

Though notice is in equity equivalent to registry,

Memorials under the Registry Acts.

the deed first registered must prevail *at law* (*u*): *Doe* d. *Robinson* v. *Allsop*, 5 B. & Al. 142; see *Tunstall* v. *Trappes*, 3 Sim. 301; *Benham* v. *Keene*, 1 J. & H. 685.

Registry not notice.

Registration is not itself notice (*x*); and therefore a purchaser or mortgagee who obtains the legal estate is not affected by a prior equitable registered incumbrancer of which he had no notice *aliunde*: *Morecock* v. *Dickins*, Amb. 678; *Cator* v. *Cooley*, 1 Cox, 182; *Underwood* v. *Courtown*, 2 Sch. & L. 64; *Pentland* v. *Stokes*, 2 Ba. & B. 75, 300, 521; *Wiseman* v. *Westland*, 1 Y. & J. 117. And a purchaser who has made a partial search will not be presumed to have notice of deeds recorded in a part of the register to which his search has not extended: *Hodgson* v. *Dean*, 2 S. & St. 221. As to costs of registry searches, see *Re Murray and Hegarty's Contract*, 15 L. R. Ir. 510.

Partial search.

Further charge without notice of registered puisne mortgage.

A first mortgagee advancing more money on the security, after a second mortgage, which had been registered, but of which he had no notice, shall have priority over such second mortgagee in respect of the advances so made: *Bedford* v. *Backhouse*, 2 Eq. Ca. Ab. 615, pl. 12; *Wrightson* v. *Hudson*, Id. 609, pl. 7; and see under the Irish Registry Act (6 Anne, c. 2), *Re O'Byrne's Estate*, 15 L. R. Ir. 373. The Registry Acts do not affect any of the equities incident to legal titles duly registered, or of which there is notice: *Le Neve* v. *Le Neve*, 3 Atk. 651; see also *Ford* v. *White*, 16 Beav. 120. So, if a mortgagor, without notice of a registered transfer of the mortgage, pays the mortgage-money to the mortgagee, he is entitled to call for a conveyance of the legal estate: *Williams* v. *Sorrell*, 4 Ves. 389;

(*u*) Consequently, if a conveyance of the legal estate has not been registered, and the purchaser has a good equitable title, he may by registering his own equitable conveyance defeat the unregistered conveyance at law, and save the expense of getting in the legal estate.

(*x*) Sect. 15 of the Act of 1884, providing that registration should be actual notice, has been repealed by the Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26).

Memorials under the Registry Acts.

see *Cator* v. *Cooley*, 1 Cox, 182; *Chandos* v. *Brownlow*, 2 Ridg. P. C. 428.

Unregistered conveyance does not exclude a title by act of law.

Purchasers from a party apparently entitled by devolution or act of law will not be defeated by a prior unregistered conveyance defeating that title. Thus a purchaser from an heir will not be defeated by an unregistered conveyance or will of the ancestor: see *Blades* v. *Blades*, 1 Eq. Ab. 358. So it has been held, on the Irish Registry Act (6 Anne, c. 2, I.), that an unregistered marriage settlement of leaseholds belonging to the wife could not be set up against a registered lease by the husband under his supposed marital title: *Warburton* v. *Loveland* d. *Ivie*, 2 Dow. & Cl. 480. In that case it was also held, that, the title of the husband's lessee being good, an assignee of such lease was entitled, although his assignment was not registered. There was no conflict of title between parties claiming under a registered title.

Equitable mortgage.

In *Sumpter* v. *Cooper*, 2 B. & Ad. 223, an equitable mortgagee by deposit was held entitled to hold against the assignees in bankruptcy of the depositor, whose assignment had been duly registered. Lord *Tenterden*, C.J., said—"We think the statute cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds. And where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered." So also an agreement to assign leaseholds as security for a loan has been held not to be within the Registry Acts: *Wright* v. *Stansfeld*, 5 Jur. (N. S.) 5; *S. C.* 27 Beav. 8. See however *Moore* v. *Culverhouse*, 27 Beav. 639, where a house in Middlesex was mortgaged to R., who duly registered the mortgage deed; R. subsequently advanced further moneys on the security of a deed of further charge on the house, which was not registered; the house was afterwards mortgaged to M., without notice of the further charge, who registered his mortgage: it was held that M. had obtained priority over R.'s unregistered charge. So also in a memorandum not under seal accompanying a deposit of deeds by way of equitable mortgage has

Memorials under the Registry Acts.

been held to require registration: *Hunt* v. *Neve*, 33 L. J. Ch. 19.

The local Registry Acts apply only to dealings at law or in equity with the land itself. Accordingly, it has been held that a mortgagee of a share in the proceeds of real estate in Middlesex devised in trust for sale did not gain any priority by registering his mortgage over other incumbrancers, but that the priorities of the incumbrancers was regulated by the dates of their respective notices to the trustees of the will: *Arden* v. *Arden*, 29 Ch. D. 702. So in *Malcolm* v. *Charlesworth*, 1 Keen, 63, it was decided that an assignment of a legacy upon land in Yorkshire did not affect the land within the meaning of the Registry Acts, but was an assignment of money only.

Mortgage of share in proceeds of sale of land.

Legacy charged on land.

PRECEDENTS.

I. *GENERAL FORM of a* MEMORIAL *of a* DEED (*a*).

[TO THE REGISTRAR of the —— Riding of the County of York (*b*).

A MEMORIAL (*c*) to be registered of an indenture bearing date the —— day of ——, 18—, and made between [A. B.], of, &c., of the first part; [C. D.], of, &c., of the second part; and [E.F.], of, &c., of the third part; of and concerning ALL THAT [*parcels, as in the deed*] (*d*), with their appurtenances. WHICH indenture, as to the execution thereof by the said [A.B.], is witnessed by [A. Z.], of, &c., and [B. Y.], of, &c. (*e*), his clerk; and, as to the execution thereof by the said [C. D.] and [E. F.],

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As to the contents of the memorial.

(*a*) This form contains all that is required by any of the Registry Acts, and is commonly used in Yorkshire. In Middlesex, the practice of the office has been to encourage the insertion of much superfluous matter, which can scarcely ever be useful and may be detrimental to the interests of the grantee, who is always the registering party, and whose sole interest and safety the solicitor should remember it is his first duty to consider. See *Wollaston* v. *Hakewell*, 3 Scott, N. R. 593.

Address.

(*b*) It is not the practice to address memorials for registry in Middlesex.

Stamp.

(*c*) Stamp, 2*s.* 6*d.*

Description by schedule.

(*d*) If the description in the deed is by reference to a schedule, say—

"ALL THOSE messuages, &c., particularly described in the schedule to the said indenture, a copy whereof is hereunder written."

Plan.

If the premises are described by reference to a plan (a copy of which should be made on the memorial, and another on paper, to be entered in the registrar's book), add—

"a map or plan whereof is drawn in the margin of the said indenture, and of this memorial."

Witnesses.

(*e*) The addition and place of abode of every witness must be stated in the memorial, whether stated in the attestation to the deed or not, *ante*, p. 4.

is witnessed by [R. T.], of ——, in the county of ——, gent. (*f*).

As WITNESS the hand and seal of the said [C. D.].

Signed and sealed in the presence of } (L. S.) [C D.]

[*Two witnesses.*]

II. *MEMORIAL of* MORTGAGE *by way of* UNDERLEASE, *registered at the same Time as the Lease, and written under the Memorial thereof.*

A MEMORIAL (*g*) to be registered of an indenture, bearing date the —— day of ——, made between the above-named [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part; of and concerning all and singular the hereditaments and premises mentioned and described in the above memorial. WHICH indenture, as to the execution by the said [*mortgagor*], is witnessed by [*witness*], of, &c.; and, as to the execution by [*mortgagee*], is witnessed by [*witnesses*], of, &c.

As WITNESS the hand and seal of the said [*mortgagee*].

[*Two witnesses.*]

III. *CERTIFICATE of* SATISFACTION *of* MORTGAGE.

TO THE REGISTRAR for the County of Middlesex: I, [*mortgagee*], (*or the executor or administrator of the mortgagee,*

(*f*) If the deed is required to be registered by the heir or devisee of the grantee, it is proper to insert a statement to that effect, thus— Registration by heir or devisee.

"And the same indenture is hereby required to be registered by [M. D.], heir-at-law of the said [C. D.]," [*or as the case may be,* "by [M. N.], devisee named in the last will and testament of the said [C. D.]]."

(*g*) Stamp 2*s.* 6*d.*

III. Certificate of Satisfaction of Mortgage.

as the case may be, of, &c., do hereby certify, that [*mortgagor*], of, &c., hath paid and satisfied all monies due and owing upon an indenture of mortgage bearing date the —— day of ——, made between the said [*mortgagor*] and [*wife*], his wife, of the first part; [*trustee*], of, &c., of the second part; and me, the said [*mortgagee*], (*or, if by an executor or administrator*, "and the said [*mortgagee*], deceased"), of the third part; a memorial whereof was registered on the —— day of the same month of ——, B. ——, No. ——. And I do hereby require an entry of such payment and satisfaction to be made in the Registrar's Book wherein the same is registered, pursuant to the act of Parliament in that case made and provided.

As witness my hand this —— day of ——, 18—.

Signed, and satisfaction acknowledged, in the presence of } [*Signature of Mortgagee.*]

[*Two witnesses.*]

IV. *MEMORIAL of a* Judgment.

A MEMORIAL (*gg*) to be registered of a judgment in her Majesty's High Court of Justice, Queen's Bench Division, of —— Sittings, in the —— year of the reign of Queen Victoria, Roll No. ——, between [A. B.], plaintiff, and [C. D.], defendant; in an action of debt for 100*l.* and costs 63*s.*; which judgment was signed in the above action on the —— day of —— last. Dated the —— day of ——, 18—.

[A. B.], Secondary.

(*Then follows this Affidavit.*)

[A. B.], clerk to ——, of Lincoln's Inn, in the county of Middlesex, gent., maketh oath, That he was present, and did

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(*gg*) Stamp, 2*s.* 6*d.*

see [*secondary*], Secondary of her Majesty's High Court of Justice, Queen's Bench Division, sign the above certificate.

[*Deponent*].

Sworn at the public office, in Southampton Buildings, Chancery Lane, this —— day of ——, 18—, before me,

[*Master.*]

V. *MEMORIAL of a* WILL (*h*).

A MEMORIAL (*i*) to be registered of the last will of [*testator*], late of —— street, in the parish of ——, in the county of ——, deceased, dated the —— day of ——. BY WHICH will the said testator devised and bequeathed all his real and personal estate and effects unto [*devisees*], their heirs, executors, and administrators, upon and for certain trusts and purposes therein mentioned, WHICH will was executed by the said testator in the presence of [*witnesses*], of, &c. And the same is hereby required to be registered by [*devisee*], one of the devisees therein named.

AS WITNESS, &c. (*ut ante*).

(*h*) Much inconvenience arises in practice from the frequency of the neglect to register wills within the period required by the statute. Where the devisee is not the heir, it should never be omitted. As to registering of wills.

It is often impracticable to state the limitations in the will in a short compass, and never necessary to mention them at all. It is sufficient in Yorkshire, if, after stating the date of the will, the memorial proceed thus— Variation for Yorkshire.

"of and concerning all [*here transcribe all descriptive words in the will which include the lands in respect of which the registry is made*]. WHICH will was executed," &c.

(*i*) Stamp, 2*s.* 6*d.*

VI. *AFFIDAVIT of the* EXECUTION *of a* DEED *and* MEMORIAL.

[TO THE REGISTRAR, &c., *ut ante*, p. 20 (*j*).]

"[A. B.], of, &c., solicitor, maketh oath and saith, that he was present, and did see [Y. Z.], of, &c., esquire, sign and seal the memorial above written [*or*, 'hereunto annexed']: and this deponent further saith, that he was present, and did see the deed dated the —— day of ——, referred to in such memorial duly signed, sealed, and delivered by the said [Y.Z.]. And that the name [Y. Z.] subscribed to the said memorial and deed respectively is of the proper handwriting of the said [Y. Z.], and that the name [A. B.] subscribed to the said memorial and deed respectively affecting the execution thereof by the said [Y. Z.] is of the proper handwriting of this deponent (*k*).

(*Signed*) [A. B.].

Sworn at —— aforesaid, this ——
—— day of ——, before me,

[M. M.]

VII. *AFFIDAVIT of the* EXECUTION *of the* MEMORIAL *of a* WILL.

[TO THE REGISTRAR, &c., *ut ante*, p. 20 (*j*).]

[A. B.], of, &c., solicitor, maketh oath and saith, that he, this deponent, was present as witness, and did see [Y. Z.], of, &c., esquire, sign and seal the memorial above written [*or*, 'hereunto annexed']; And that the name [Y. Z.] subscribed

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Stamp.

(*j*) Stamp, 2*s.* 6*d.*

Affidavit by attesting witness.

(*k*) If the attesting witness is in town, he should attend at the office with the memorial, where the following oath is administered to him:—"You swear that you saw this memorial signed and sealed, and the deed to which it refers duly executed, by the parties thereto, whose execution you have attested." If the witness cannot personally attend at the office, he should make an affidavit (on parchment) to the effect in the text.

VII. Affidavit of Execution of Memorial of a Will.

to the said memorial as the party executing the same is of the proper handwriting of the said [Y. Z.], and that the names [A. B.] and [C. D.] subscribed to the said memorial as attesting witnesses attesting the due execution thereof by the said [Y. Z.] are respectively of the proper handwriting of him, this deponent, and of [C. D.], of, &c.

Sworn, &c.

(*Signed*) [A. B.]

RELEASES.

PRELIMINARY REMARKS.

	PAGE		PAGE
Definition of a Release	26	*Whether the General Words of a Release are controlled by the Recitals*	44
What amounts to a Release	26	*Releases to Trustees and Executors*	47
Who is competent to make, and who may take advantage of a Release	29	*Form and Contents of Deeds of Release*	49
To what demands Releases extend	35		

What amounts to a Release.

Definition of a release.

A RELEASE in the limited sense in which the word is employed in the following pages (which does not embrace the instrument considered as a conveyance operating by way of enlargement), has been defined as the giving up or discharging of a right of action which one hath or may claim against another, or the estate of another: 5 Bac. Abr. Gwill. Ed. 680; or as the quitting or renouncing that which one had before: Com. Dig. *Release* (A. 1). A release may be either by operation of law, or by express words; but it is intended to restrict the following remarks to the consideration of releases of the latter kind, with the view of aiding the conveyancer in their preparation, as occasion may require.

What words make a release.

What amounts to a Release.]—The proper words of a release, according to Littleton, are *remise*, *release*, and *quiet* (now abbreviated into *quit*) *claim* to which Sir E. Coke has added *renounce* and *acquit:* Co. Litt. 264. b. Any expressions, however, which denote the intention of the one party to discharge the other, are sufficient: *Hickmott's case*, 9 Rep. 52 b.; *Lock* v. *Etherington*, 1 Sid. 265. In the following precedents the word "release" alone is used, in accordance with the present usual practice.

What amounts to a Release.

A covenant never to sue amounts, in construction of law, to an absolute release of the covenantee; for the law, which abhors a multiplicity of suits, by this rule attains a result which without it could only be reached by the circuity of two actions; the first being for the debt, and the second upon the covenant not to sue, whereby the debtor would recover back his money: *Hodges* v. *Smith*, Cro. El. 623; *Smith* v. *Mapleback*, 1 T. R. 446; *Burgh* v. *Preston*, 8 T. R. 486; see also notes to *Cumber* v. *Wane*, Sm. L. C. 366. But, as the avoiding of circuity is the sole ground of this rule, it does not apply to a covenant not to sue by one of several partners or joint obligees: *Walmesley* v. *Cooper*, 11 A. & E. 216; *Hawkshaw* v. *Parkins*, 2 Swanst. 544. And a covenant not to sue for a definite period is no release: *Lacy* v. *Kynaston*, 1 Lord Raym. 690; 2 Salk. 575; Carth. 63; *Carvell* v. *Edwards*, Carth. 211; Holt, 546; see also *Ayloffe* v. *Scrimshawe*, 2 Salk. 573; Carth 63; *Deux* v. *Devereux*, Cr. El. 352; *Dowse* v. *Jeffreys*, 1 Roll. Ab. 939, (L), pl. 1; Ib. pl. 2; *S. C.*, sub nom. *Deux* v. *Jefferies*, Cr. El. 352; *Thimbleby* v. *Barron*, 3 M. & W. 210; *Lancaster* v. *Harrison*, 4 Moo. & P. 561; *Twopenny* v. *Young*, 3 B. & C. 308. An engagement not to sue for a definite period, if executed contemporaneously with, and indorsed upon, the instrument creating the obligation, will, it seems, be considered as a component part of such instrument, which will receive a qualified construction accordingly: *Burgh* v. *Preston*, 3 T. R. 483; see *Ex parte Henery*, cit. 1 Sch. & L. 46; *Reed* v. *Morris*, 2 My. & Cr. 361. As to the effect of a covenant not to require interest on a bond during the life of the obligor, see *Morley* v. *Frear*, 4 Moo. & P. 305.

Covenant not to sue, when a release.

Acceptance of an assignment of property in trust for sale, with a provision that no sale shall be made without giving six months' notice, does not imply an undertaking not to sue in the meantime: *Emes* v. *Widdowson*, 4 C. & P. 151; see *Good* v. *Cheesman*, 2 B. & Ad. 338; *Lewis* v. *Jones*, 4 B. & C. 506.

Release must be under seal.

A release generally speaking must be under seal. In *Rogers* v. *Payne*, 1 Wils. 376, in an action of

What amounts to a Release.

covenant for non-payment of a sum of money, the defendant having pleaded a discharge in the nature of a release without deed, the plea was held on demurrer to be ill, on the ground that a covenant to pay money, which is by deed, could not be discharged without deed: see also *Neal* v. *Sheffield*, Cr. Jac. 254; *Blake's case*, 6 Rep. 44; *Mease* v. *Mease*, Cowp. 47; *Kaye* v. *Waghorn*, 1 Taunt. 428; *Reeves* v. *Brymer*, 6 Ves. 516 (*a*); *Thomas* v. *Courtnay*, 1 B. & Al. 1. And though an executory parol agreement may be discharged by parol, yet a cause of action, which has actually accrued even under such an agreement, cannot be so released, but requires a deed: *Langdon* v. *Stokes*, Cr. Car. 383; see also *Hurford* v. *Pile*, Cr. Jac. 483; *Treswaller* v. *Keyne*, Ib. 620: unless it admit of the plea of accord and satisfaction: *Willoughby* v. *Backhouse*, 2 B. & C. 821; *Baylis* v. *Usher*, 4 Moo. & P. 791; see also *ante*, Vol. 1, p. 373. A judgment may be released by deed: *Barker* v. *St. Quentin*, 13 L. J., N. S., 144, Exch. But an obligation may be released by an intentional cancelling of the deed by the party interested in it: *Perres* v. *Bishop*, Dy. 112, a; *Argoll* v. *Cherry*, Palm. 403; *Harman* v. *Owen*, 1 Atk. 520. Parol evidence of intention is not admissible to affect the construction of a deed of release: see *Butcher* v. *Butcher*, 1 B. & P., N. R. 113; *Brooks* v. *Stuart*, 1 P. & D. 615; see also *post* p. 46, (*b*).

(*a*) In this case parol declarations by a testator, that he did not intend to call for a bond debt owing by a legatee, was held to be inoperative to release the obligor. See also *Weckett* v. *Raby*, 2 Br. P. C. 386; *Aston* v. *Pye*, 5 Ves. 350, 354; *Eden* v. *Smyth*, Id. 341. In *Gilbert* v. *Wetherell*, 2 S. & St. 254, a debt owing on a promissory note was held to be released by the destruction of the notes by the direction and in the presence of the creditor, then on his death-bed. See *Flower* v. *Marten*, 2 My. & C. 459; *Leche* v. *Lord Kilmorey*, T. & R. 207; *Warwick* v. *Rogers*, 6 Sc. N. R. 1.

(*b*) As to the doctrine that a deed cannot be varied by a parol agreement, see *Thompson* v. *Brown*, 1 Moo. 358; *Sellers* v. *Beckford*, Id. 460; *Cordwent* v. *Hunt*, 2 Moo. 660; *Brooks* v. *Nash*, 9 A. & E. 854; *Bailey* v. *Homan*, 5 Sc. 94; *Harris* v. *Goodwyn*, 2 Sc. N. R. 459; *Harris* v. *Blakeway*, 3 Sc. N. R. 199; *ante*, Vol. I., p. 344 *et seq.* In equity, of course, an unsealed agreement,

Who may Release, &c.

Who may make a release.

Who competent to make, and who may take advantage of Releases.]—A man might, by the common law, release a sum of money owing to his wife while sole: *Woodward* v. *Darcy*, Plow. 184; *Miles* v. *Williams*, 1 P. Wms. 253; but not her reversionary interest in a chose in action, which could formerly have been effectually released only by deed executed by her with her husband's concurrence, and duly acknowledged under Malins' Act, 20 & 21 Vict. c. 57: *Rogers* v. *Ancaster*, 14 Beav. 445; see also *Fitzgerald* v. *Fitzgerald*, L. R., 2 Q. B. 83. But now by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 2, every woman married after the commencement of that Act (*i.e.* the 1st of January, 1883), may dispose of her property as a *feme sole;* and by sect. 5 of that Act, a similar power is given to a woman married before the commencement of the Act, so far as regards property, "her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of this Act" (*c*). As regards property of a woman married before the commencement of the Act her title to which has not so accrued, a release, like any other disposition thereof, will be governed by the old law, and accordingly the concurrence of her husband will be necessary unless she is entitled absolutely for her separate use under a settlement or will (*d*).

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varying the terms of a deed, may be binding: *Norton* v. *Wood*, 1 Russ. & M. 178, where an injunction was granted upon an unsealed agreement, not to sue upon a bond during four years, in case the interest should be regularly paid; notwithstanding the interest had once or twice been paid one or two days after the time; the obligee being concluded by acceptance from taking advantage of such irregularity. A power of attorney given by deed may be revoked without deed: *Rex* v. *Wait*, 11 Price, 108.

(*c*) See sects. 2 and 5 of the Act set out and considered *ante*, sub tit. ACKNOWLEDGMENTS, Vol. I., pp. 225 *et seq.*

(*d*) As to releases to trustees by *cestuis que trust*, who are married women, see *post*, p. 48. It is often advisable even where a married woman is absolutely entitled for her separate use to require the concurrence of her husband in a release by her, in

Who may Release, &c.

Partners, &c.

One of several partners in trade may release a debt owing to the firm; (*ante*, Vol. IV., p. 251); although a covenant not to sue by one of them will not operate as a release, *ante*, p. 27; the power of release being in both these instances incidental to the power to receive, which is possessed by the husband and partner. So, one of several executors is competent to release a debt owing to them in that character, each having an entire interest in, and authority over, the property; Dyer, 23 b; *Jacomb* v. *Harwood*, 2 Ves. sen. 287; *Powell* v. *Evans*, 5 Ves. 844.

Executors and administrators.

But, if there be two executors, and one of them refuse to join in the action, upon which he is severed, he cannot, after such severance and judgment recovered, acknowledge satisfaction: Dyer, 319 b. It seems that one of several administrators may release a debt due to the intestate; and the opinion expressed by Lord Hardwicke to the contrary, in the case of *Hudson* v. *Hudson*, 5 Bac. Ab. 700, must apparently be referred to special circumstances. See *Williams* v. *Pen*, 5 Bac. Ab. 700; *S. C.*, nom. *Willand* v. *Fen*, Selw. N. P. 767, 6th Ed.; *Jacomb* v. *Harwood*, 2 Ves. sen. 267; *Stanley* v. *Barnes*, 1 Hagg. 222. Where an insurance office required an executor of the insured, who was beneficially entitled

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order to guard against the possibility of her having made a disposition of the property in his favour, or in order that he may join in the covenants (if any) inserted in the deed.

Restraint on anticipation.

Where a married woman is entitled to property for her separate use, either under the Married Women's Property Act, 1882, or under the old law, with a clause restraining her from anticipation, she will not generally be able effectually to release her rights or claims in respect of such property; it may, however, appear that the intention of the donor was to limit the restraint to the income, in which case she will be competent to release or otherwise deal with her interest in the capital when the time comes for payment of the fund: see *Re Bown, O'Halloran* v. *King*, W. N., 1884, p. 178. See further as to restraint on anticipation, *post*, sub tit. SETTLEMENTS, pp. 291 *et seq.* As to the effect of acquiescence in a breach of trust by a married woman, entitled for her separate use without power of anticipation: *Derbyshire* v. *Home*, 3 De G. M. & G. 80; *Wilton* v. *Hill*, 25 L. J. Ch. (N. S.) 156; *Davies* v. *Hodgson*, 25 Beav. 186; *Clive* v. *Carew*, 1 J. & H. 205; *Rowley* v. *Unwin*, 2 K. & J. 138; *Heath* v. *Wickham*, 3 L. R. Ir. 376.

Who may Release, &c.

to the policy in his own right by reason of certain transactions with his testator, to sign a receipt as executor, it was held that this did not entitle the creditors of the deceased to charge the executor with the amount as assets: *Glaholme* v. *Rountree*, 1 Jur. 284.

Lessor.

The lessor of the plaintiff, in an action of ejectment, cannot release the action: *Doe* v. *Brewer*, 4 M. & S. 300.

Joint obligee; one of the several plaintiffs.

One of several joint obligees may release the obligation: 2 Roll. Abr. 410 (D.) pl. 1. So generally one of several co-plaintiffs may release the cause of action: *Arton* v. *Booth*, 4 Moo. 194; *Furnival* v. *Weston*, 7 Moo. 356; though the plaintiffs be trustees: *Bayley* v. *Loyd*, 7 Mod. 250; 1 Sel. N. P. 560: see also *Gibson* v. *Winter*, 5 B. & Ad. 96; *Wilkinson* v. *Lindo*, 7 M. & W. 81. But if this power be exercised fraudulently, the Court will set aside the release: *Jones* v. *Herbert*, 7 Taunt. 421; *Mountstephen* v. *Brooke*, 1 Chit. 390; see *Legh* v. *Legh*, 1 Bos. & P. 447; *Payne* v. *Rogers*, Ib. n.; Doug. 470; see also, *infra*, p. 42.

Obligee after assignment.

In *Bower* v. *Swadlin*, 1 Atk. 294, Lord *Hardwicke* doubted whether an obligee could release a bond after assignment. It is now clear that after an assignment of a debt of which the debtor has notice, the debtor cannot accept a release from the assignor, for the act being evidently against good faith, the Court would refuse to give any effect to such a release: *Legh* v. *Legh*, 1 Bos. & P. 447; *Craib* v. *D'Aeth*, ib. n.; 7 L. T. 670, n.

Release of covenant running with the land.

Where a covenant runs with land (as to which see *ante*, sub tit. "PURCHASE DEEDS," Vol. V. pp. 257 *et seq.*), and the covenantee has assigned the land, it should seem that the covenantee cannot subsequently release the covenant, as the assignment has vested the entire benefit of the covenant in the assignee: *Roe* v. *Hayley*, 12 East, 468. But in *Middlemore* v. *Goodall*, Cr. Car. 503, it seems to have been thought that the doctrine was confined to a release after action brought by the assignee, and that the covenantee might, before any breach or before the suit commenced, release the cause of action, though the breach were posterior to the assignment; but the

Who may Release, &c.

case did not raise the point, as the release was given pending the suit by the assignee, and therefore was clearly void. The reason for such a distinction is not very apparent.

Stranger to a deed cannot sustain an action on it.

On the general principle, that a stranger to a deed cannot take the benefit of it, covenants in an indenture entered into with persons who are not parties confer no right of action on such persons; and where a deed is expressed to be made between parties, the persons so named alone are parties to the instrument: see *Scudamore* v. *Vanderstene*, 2 Inst. 673; *Cooker* v. *Child*, cit. 3 Lev. 139; so in *Offley* v. *Ward*, cit. 3 Lev. 140, where to an action of debt by A. upon a single bill made to A. by the defendant, to the use of A. and B., the defendant pleaded a release by B., it was adjudged to be no bar, for he, being a stranger to the bill, could not release it, though it was made to his use; see also *Gilbey* v. *Copley*, 3 Lev. 138; so in *ex parte Richardson*, 14 Ves. 187, Lord *Eldon* was clearly of opinion, that a covenant made with a party to the deed, for the use of another not a party, could not be considered as a covenant with the latter; see *Bushell* v. *Beavan*, 4 Moo. & Sc. 658.

And in further accordance with this rule, the Court of King's Bench, in *Metcalfe* v. *Rycroft*, 6 M. & S. 75, decided that an action of covenant could not be maintained in the joint names of several partners, one of whom had executed a composition deed with a debtor of the firm, the indenture being made in the usual manner, between the debtor, of the one part, and the creditors, whose names and seals were set and subscribed, of the other part; and therefore, though the covenant was made in express terms with the executing creditors and their partners, and though the partner signed in the name of the firm, it was held, that the non-executing partner, being no party, ought not to have been joined in the action.

The principle in question was again recognized in *Doe* d. *Bedford* v. *White*, 12 Moo. 526, where it was admitted by more than one of the learned judges, that a right of re-entry in a lease could not be

Who may Release, &c.

reserved to a person who was not a party to the deed. See *Berkeley* v. *Hardy*, 5 B. & C. 355; *Lord Southampton* v. *Brown*, 6 B. & C. 718; *Barford* v. *Stuckey*, 5 Moo. 22; 8 Moo. 88; *Ex parte Richardson*, 14 Ves. 187; *Colyear* v. *Mulgrave*, 2 Keen, 81; *Garder* v. *Lachlan*, 4 My. & C. 129; see also *ante*, sub tit. LEASES, Vol. III., p. 251.

Covenantor bound, though not a party.

But the rule in question applies only to the covenantee, and not to the covenantor; for a person will be *bound* by a covenant in a deed executed by him, though he is not mentioned in the *exordium* as one of the parties to it: *Salter* v. *Kidyley*, Carth. 76.

Release by indenture cannot be pleaded by a person who is not a party to it.

The same principles which apply to deeds of covenant are applicable to releases; for it has been decided, that a release made between certain parties cannot be set up against the claims of the releasor by a third person who is no party, though it professes to discharge him from those claims. And therefore, where, in an action brought upon a charter-party, the defendants pleaded a release, sealed with the seal of the plaintiff, by which he released the defendants from the covenants of the charter-party, and all claims and demands in respect thereof; and the plaintiff replied to this plea, that the release was made between the plaintiff and third persons, and the defendants were no parties to it, but wholly strangers, this replication was held to be good upon demurrer: *Storer* v. *Gordon*, 3 M. & S. 308.

Release by one who is not a party to the deed.

Applying to releases the principle of the distinction laid down in *Salter* v. *Kidgley*, in regard to *covenants*, it should seem, that, though a release cannot be taken advantage of by a person who is a stranger, yet that an instrument of this kind may operate as the release of any person who has executed it, though he were not a party; or, in other words, that the releasor need not, though the releasee must be a party to, or, in the case of a deed poll, must be expressly named in the instrument.

However, before a conclusion is formed in *any* case that an instrument has failed of effect because made for the benefit of a person who is not a party, it will be proper to scrutinize the context, bearing

Who may Release, &c.

in mind the readiness of the Courts to supply omissions, when there is reason to infer that they have resulted from clerical inadvertence, and not from design.

Release of right does not require words of limitation.

A release of a right in lands to a person seised in fee-simple need not be made to the heirs of the releasee; for if the release were made to him for one day, or one hour, it is as good as if it were made to the releasee and his heirs; for, when the right has once gone from him by his release, without any condition, &c., to him that hath the fee-simple, it is gone for ever: Co. Litt. 273, b. 274.

A release to several discharges them from claims against them respectively.

A release to A. and B. of all actions which the releasor has against them, *or either of them*, extends to actions against the releasees *severally* as well as jointly: 2 Roll. Ab. 414 (K), pl. 2; and even without the words "or either of them," the construction, it seems, would be the same: 2 Roll. Ab. 414 (K), pl. 4; Lord Raym. 235; Touch. 344. "If I release unto you all actions which I have against you and another, in this case, notwithstanding the joint words, all actions which I have against you alone are released, for it shall be most beneficially for him to whom the release is made, and most strongly against him who makes it:" *Windham's Case*, 5 Rep. 7a.

Release to one of several co-debtors.

A release to one of several co-debtors discharges all, though they are *severally* as well as jointly bound; for, "in such a case, the joint remedy being gone, the several is so likewise:" 5 Bac. Ab. 702; 2 Roll. Ab. 412 (G), pl. 5; Co. Litt. 232a.; *Dennis* v. *Payn*, Cro. Car. 551; *Brooks* v. *Stuart*, 1 P. & D. 615. See also *Payler* v. *Homersham*, 4 M. & S. 427; *Rex* v. *Bayley*, 1 C. & P. 435. The doctrine holds in equity as well as at law: *Bower* v. *Swadlin*, 1 Atk. 294; and a proviso introduced into a deed of release, that the co-debtor shall not take advantage of the release, would be repugnant and void: *Everard* v. *Herne*, Lit. Rep. 190. But a proviso, that a release shall not extend to prejudice or affect any claims which the releasor may have against the releasee jointly with a third person, is a valid qualification of the release; for the effect is not (as it

Who may Release, &c.

would be in the instance just mentioned) to discharge the releasee and not the co-debtor (which is an impracticable object), but merely to take the joint debts altogether out of the operation of the release: and therefore, to an action brought against the releasee and his co-debtor jointly, the release is by its express terms no bar: *Solly* v. *Forbes*, 4 Moo. 448; *Twopenny* v. *Young*, 3 B. & C. 211. Where A. and B. gave the plaintiff their joint and several note to secure two separate debts, one due from A. and the other from B., it was of course held, that a release to A., though it discharged both as to the note, did not discharge B. from his separate debt: *Cocks* v. *Nash*, 4 Moo. & Sc. 162. Where it did not appear on the face of a joint bond by A., B., and C., that B. and C. were sureties for A., it was held, that a release given by the obligee to A.'s executor was no answer to an action against the survivors: *Ashbee* v. *Pidduck*, 1 M. & W. 564.

It is to be observed that the rule, that a release to one of several co-debtors discharges all, is confined to a release, properly and technically so called; for a perpetual covenant not to sue, which (we have seen) operates as an absolute release of the covenantee, will not discharge a co-debtor: *Lacy* v. *Kinaston*, 12 Mod. 548; 1 Lord Raym. 688; *Dean* v. *Newhall*, 8 T. R. 168; though the debt of the covenantee and the third person is joint only, and not joint and several: *Hutton* v. *Eyre*, 6 Taunt. 289; see *Walmsley* v. *Cooper*, 11 A. & E. 216.

A release of breaches of trust to one trustee will generally enure to the benefit of his co-trustees: *Thompson* v. *Harrison*, 2 Br. C. C. 164; *Blackwood* v. *Borrowes*, 2 Con. & L. 459.

Rule where the releasor has demands against the releasee in several rights.

To what Demands Releases extend, both as to their Nature and Time of becoming due.]—Where the releasor in his own right, as well as in the right of another, has demands against the releasee, the question is raised, unless precluded (as it ought always to be) by an unequivocal expression of the intention, whether the release extends to both or one only of these species of demands.

Extent of Releases.

Release by executor or administrator.

A release by an executor or administrator (but without designating him as such) seems, by the better opinion, to be confined to claims in his own right, unless his only claims are in the representative character. Such, at least, is the doctrine maintained in some of the cases. Thus, in *Knight* v. *Cole*, Carth. 120, 3 Lev. 274, where the releasor had a demand in his own right, and another as executor, against the releasee, the Court observed, that no mention was made of releasing any suit which the releasor had in right of his executorship; therefore those words should not extend to any demand he had in that capacity, *since he had at that very time one demand in his own right.* The case, however, was partly decided upon another point: see *Payler* v. *Homersham*, 4 M. & S. 423, *post*, p. 45. So, in *Hutchinson* v. *Savage*, 2 Ld. Raym. 1306, where, in an action by an administrator, the defendant pleaded a general release of all debts, duties, and demands; to which the plaintiff replied, that, at the making of the release (which it seems the plaintiff had executed as one of the general creditors of the defendant), the defendant was indebted to him in his own right in the sum of 6*l.*, and that he gave the release in respect of that debt; but the defendant's counsel contended, that such general release discharged the debt due to him as administrator, and cited Roll. Ab. 404. *Powell*, J., said, that the case in Roll. Abr. was taken out of the Year Book of Edw. 3 (39 Edw. 3, 96), at which time the law was, that a grant of *omnia bona sua* by an executor or administrator passed goods which he had as executor or administrator, but now that case is held contrary; and there is no difference between a grant and a release; therefore, that case of a grant of *omnia bona sua* will govern the present case: but if there had been no other debts for the release to work upon, then it had released this debt. And *Holt*, C. J., seems to have concurred in the concluding position of his learned brother's argument; for he observed, "if he have no goods but as administrator they must pass by a grant of *omnia bona sua*." The case, however, was adjourned, and it does not appear

Knight v. *Cole.*

Hutchinson v. *Savage.*

Extent of Releases.

what was the ultimate decision. On the other hand it is broadly laid down by some text-writers, that, "if an executor releases all actions, this will extend as well to actions which he hath in his own right, as to those which he hath as executor:" 5 Bac. Ab. 700, citing 39 Edw. 3; Touch. 345.

General conclusion from the cases.

Though the cases of *Knight* v. *Cole* and *Hutchinson* v. *Savage* are not, it must be admitted, a complete adjudication of the point, yet the reasonableness of the rule they support appears likely to insure its adoption at the present day, in opposition to the doctrine just quoted, which seems to be founded exclusively on the passage in the Year Book, and would generally, it is conceived, conflict with the intention.

Release expressly in a particular right.

At all events, it is not to be doubted that a release made expressly in a particular right or capacity is restricted in its operation to demands arising in such right or capacity; and therefore, where A. executed to B. a release of all actions which A. had against B. on his own account, it was held, that this did not discharge a bond which the releasor, jointly with another *as trustees*, had taken from the releasee; for that these words could only have been put in to distinguish demands which A. had in his own right, from those he had in right of or in trust for others: *Stokes* v. *Stokes*, 1 Lev. 272; *S. C.* nom. *Nokes* v. ——, 1 Vent. 35. This case seems to overrule a position much cited in the early books, that, if "a man makes a release to another by the name of executor of J. S., this will release all actions which he hath in his own right, as well as those which he hath as executor: 2 Roll. Ab. 414 (A), pl. 5;" which is not only inconsistent with the case in question, but evidently contravenes the rule *expressio unius est exclusio alterius.*

Accessory follows principal.

In a release of the principal the accessory is included; and therefore a release of all debts or duties will operate as a discharge of all actions, judgments, executions, and obligations: Touch. 342; 2 Roll. Ab. 410 (B), pl. 2; and a release of judgments will extend to an execution: Touch. 343. And a release of a fraud or breach of trust will debar the releasor

Extent of Releases.

from his remedy against parties secondarily liable: *Thompson* v. *Harrison*, 2 Br. C. C. 164; see *Blackwood* v. *Borrows*, 2 Con. & L. 478. So, a release of covenants would operate to discharge a bond given for the performance of those covenants; *contrà*, it seems, if the bond had been forfeited by the breach of the covenants previously to the release being given: *Reade* v. *Bullocke*, Dyer, 56 b. By releasing the debt, the security for the debt is released; and therefore, where by a composition deed a creditor released his debtor from all debts, accounts, actions, claims, &c., it was held, that he had thereby discharged his lien upon an indenture of lease which had been deposited with him by the debtor as a security for his debt, so that the subsequent giving up of that deed formed no consideration for a new promise: *Cowper* v. *Green*, 7 M. & W. 633; see also *Cragoe* v. *Jones*, L. R. 8 Ex. 81. But a release of one of two co-sureties, who contract severally, does not necessarily release the other of them, unless it is shown that there is a right of contribution from the releasee which has been taken away or prejudiced by the release: *Ward* v. *National Bank of New Zealand*, 8 App. Ca. 755.

Release of debt discharges all securities.

An entire right extinguished by a release of part.

If a man be bound to perform two things, the covenantee may discharge one of them; but at common law an entire thing cannot be released in part: 3 Bulst. 232. Formerly, on this principle, if the owner of a rentcharge issuing out of twenty acres released all his right to one acre, the rent was extinguished in the whole: Co. Litt. 148 (*e*).

So also if a creditor by judgment or statute released to his debtor all his right, interest, or demand in the lands generally, or any particular lands of the debtor, he might notwithstanding afterwards sue out execution against the lands, for he had no right or demand in or upon the land at the time of the release: *Barrow* v. *Gray*, Cr. El. 552. But a re-

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Covenant not to distrain on part of the land is no release.

(*e*) It seems that a covenant not to distrain on part of the land is no release; as the reason on which a covenant not to exercise a legal right is held to amount to a release of the right does not apply to the case in question. See *Hutton* v. *Eyre*, 6 Taunt. 289.

lease after execution levied discharged the land; and in such case a release of part of the land extended operated as a release of the whole, for it would be a discharge not merely of the land expressed to be released, but of the execution: 5 Bac. Ab. 713. Extent of Releases.

It is said that a release of all suits will extend to an execution, because an execution cannot be had without application to the Court, which is the "suit" of the party: 8 Rep. 153 b. But that a release of all actions is no bar of an execution, "which is not an action, but begins when the action ends": Co. Litt. 291 a. Execution, when released. Distinction between "suits" and "actions."

Now by the stat. 22 & 23 Vict. c. 35, sect. 10, it is provided that the release from a rentcharge of part of the hereditaments charged therewith shall not extinguish the whole rentcharge, but only bar the right to recover any part of the rentcharge out of the hereditaments released (*f*). And by sect. 11 of the same Act the release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased (*g*). Release of rentcharge.

It should be observed that a release of all demands is confined to demands existing at the time of the release, and therefore does not extend to a covenant then unbroken; for, before the breach, there is no "demand": *Hawle* v. *Kirkeby*, Moore, 34 pl. 112; Dy. 217 b; *Carthage* v. *Manby*, 2 Show. 90; *Belcher and Hudson's Case*, Touch. 344; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235, 662; 1 Salk. 171. *Contrà*, if the release be expressly of covenants: *Hancock* v. *Field*, Cr. Jac. 170; 2 Roll. Ab. 407, pl. 21. So, a release of all demands will not discharge a legacy payable at a future day: see *Lam-* As to demands not due at the time of the release.

(*f*) See further as to releases of rentcharges, &c., *ante*, sub tit. Annuities, Vol. I., pp. 681 *et seq.*

(*g*) The enactments above referred to are sometimes of practical convenience where it happens that an annuitant or creditor is willing to discharge particular lands about to be conveyed to a purchaser or mortgagee, by enabling him to do so without prejudice to his claim against the other property charged.

Extent of Releases.

pet's Case, 10 Rep. 46 b. *Contrà*, if the release be expressly of legacies: Dy. 56; Co. Litt. 76. Where the demand in question arises out of the agreement under which the release is executed, and is part of the consideration for the release, of course the release cannot be set up as a bar to such demand: *Porter* v. *Phillips*, Cr. Jac. 623; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235, 662. And a release will not extend to claims of which the releasor is ignorant at the time of making the release: see *infra*, p. 42.

Effect of release on unaccrued rent.

As to the effect of releases upon unaccrued *rents*, vide *ante*, Vol. I., p. 682. In *Cooper* v. *Robinson*, 10 M. & W. 695, in replevin on a distress for rent due at Michaelmas, 1841, it was held, that a lease of the premises dated in February, 1841, but really executed after Michaelmas, 1841, *habendum* from 30th July, 1840, for fourteen years, at a rent of 86*l.* payable half-yearly, the first payment to be made at Lady-day *next*, was no release. The deed operated from its execution, and the naming of a term commencing prior to its date was a mere mode of computation.

Whether it operates up to the date or delivery.

A release of all demands up to the *making* of the release will extend to a cause of action arising in the interval between the date and delivery: *Hedley* v. *Joans*, Dyer, 307 a. But *contrà*, if the release be, according to the usual form, of all demands up to the day of the *date* of the release: its operation being then confined to the date. And therefore, where A., on the 1st of June, executed to B. a release dated on the 1st of March, of all demands up to the date, it was held that it did not release an obligation executed and dated on the 1st of May: *Drury's Case*, Cr. El. 14; see Roll. Abr. 410 (A), pl. 5. And the computation in such cases is *exclusive* of the day of the date. Thus, in trespass, assault, and battery, the defendant pleaded a general release of all actions, &c., from the beginning of the world *usque ad diem datûs* of the said release; and it happened that the battery was done upon that very day on which the release was dated; wherefore, it was held that the action was not discharged, for

Day of the date excluded.

Extent of Releases.

the release did not include that day: *Dixon* v. *Terry*, 3 Mod. 182; 5 Bac. Ab., Gwill. ed., 712; *Nichols* v. *Ramsden*, 2 Mod. 280; *Newman* v. *Beaumond*, Owen, 50. See *Rex* v. *Haverstock*, Burr. Sett. Cas. 719. So, in *Roche* v. *Morgell*, 2 Sch. & L. 730, Lord Redesdale seems to have considered, that a release of all demands "unto" a certain day did not include transactions *on* that day. There can be no doubt, however, that the recital of an intention to include transactions occurring on the day of the date, would be a ground for giving to the deed this extended operation, as will be shown more fully in the next section. In *Rex* v. *Stevens*, 5 East, 244, a statement in an indenture, that A. held an office "until the 29th November, 1794," and, whilst he held the office, did, on that day, &c., was held to be consistent, on the ground that the word was capable of either meaning. Where an arbitrator enlarged the time for making an "award" until a certain day, it was held, that that day was included: *Knox* v. *Simmonds*, 1 Ves. jun. 369; *Kerr* v. *Jeston*, 1 Dowl. (N. S.) 538. The exclusion of the day named, where there are no recitals evidencing a different intention, would be consistent with the now settled rule, that, where an act is to be done within a certain number of days "from" a particular day, the day named is excluded from the computation, unless there are special grounds for a different construction; a rule, however, which is partly founded on reasoning that would not be applicable to the case now under consideration: see *Young* v. *Higgon*, 6 M. & W. 49; *Williams* v. *Burgess*, 12 A. & E. 635; *Gorst* v. *Lowndes*, 11 Sim. 434; *Stanley* v. *Bond*, 1 Phill. 103; *Lester* v. *Garland*, 15 Ves. 248.

In the absence of fraud a release given by creditors to a trustee in a liquidation has been held to protect both the trustee personally and the debtor's estate from all claims, even though it be shown that he had committed a default in the administration of the estate: *Ex parte Carter*, 8 Ch. D. 731; unless indeed there is money to pay the claimants' demand actually in the trustee's hands for that purpose:

Extent of Releases.

Ex parte Société Cockerill, 3 Ch. D. 115. See also the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 82.

Setting aside release on ground of fraud.

In *Manning* v. *Cox*, 7 Moo. 617, a general release by a trustee plaintiff was set aside at law under the following circumstances:—Leasehold property had been bequeathed to the plaintiff in trust to receive the rents for the benefit of the testator's children, with power to lease, which power he exercised by granting a lease to the defendants. The trustee having misapplied the rents, a bill in equity was filed against him at the suit of one of the parties beneficially interested under the will, and a receiver was appointed, who sued the lessees in the name of the trustee for non-payment of rent: the defendants pleaded a release executed to them by the trustee (who had absconded) pending the suit: the Court ordered the plea to be set aside, and the release delivered up to be cancelled.

In *Phillips* v. *Claggett*, 11 M. & W. 93, *Parke*, B., said: "The cases cited clearly establish that the Court may exercise an equitable jurisdiction for the purpose of preventing the defendant from pleading pleas of release, where the release is valid in point of law, but invalid in equity, as being a fraud for which the defendant is answerable. In order to call upon the Court to exercise its equitable jurisdiction, it must be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff seeking to enforce the demand, and that the defendant was a party to that fraud." See the cases cited *supra*, and *Hickey* v. *Burt*, 7 Taunt. 48; *Monger* v. *Kett*, 12 Mod. 558; *Innell* v. *Newman*, 4 B. & Al. 419; *Barker* v. *Richardson*, 1 Y. & J. 362; *Herbert* v. *Pigott*, 2 Cr. & M. 384; *Johnson* v. *Holdsworth*, 4 Dow. P. C. 63; *Crook* v. *Stephens*, 7 Scott, 848; *Wild* v. *Williams*, 6 M. & W. 490.

Releases, when vacated in equity.

In equity, releases are frequently set aside on the ground that they have extended to matters not contemplated by the releasor, or have been obtained from persons who, at the time, were not conusant of their rights: *Bantrey* v. *Ibson*, 1 Ch. Cas. 46;

Freem. 179 ; *Gee* v. *Spencer*, 1 Vern. 32 ; *Broderick* v. *Broderick*, 1 P. Wms. 239 ; *Pascoe* v. *Pascoe*, 2 Cox, 109. Extent of Releases.

In *Ramsden* v. *Hylton*, 2 Ves. sen. 305, a general release executed by a lady to her brother, of all claims and demands by reason of the will of their mother, or of their deceased brother's or father's personal estate, or of the leases of certain collieries, or for or by reason of any other matter or thing except a certain bond therein recited, was held not to discharge the sister's claim to a portion under a settlement executed by their father on his marriage, of the existence of which both the releasor and releasee were ignorant. See *Cole* v. *Gibson*, 1 Ves. sen. 507 ; *Farewell* v. *Coker*, cit. 2 Mer. 353 ; *Eaves* v. *Hickson*, 30 Beav. 136 ; *Anon.* 31 Beav. 310 ; *Gresley* v. *Moulsey*, 7 De G. & J. 78 ; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149 ; *London and S. W. Rail. Co.* v. *Blackmore*, L. R. 4 H. L. 610 ; *Turner* v. *Turner*, 14 Ch. D. 829 ; *Re Garnett, Gandy* v. *Macaulay*, 31 Ch. D. 1. Ignorance of rights.

"In the absence of fraud, or abused confidence, or pressure, every item in an account, of which the parties were fully cognizant at the time they settled it, may be considered as the subject of agreement between them, which they are no more at liberty to repudiate than any other contract or undertaking into which they may deliberately have entered. A plaintiff, asking to open an account on proving errors in it, should be prepared, not only to prove the fact of error, but to meet any case set up by the defendant of his having settled the account with a knowledge of the circumstances constituting such alleged error." *Per* Lord *Cottenham*, C., *Maund* v. *Allies*, 5 Jur. 851. See *Darthez* v. *Lee*, 2 Y. & C. 5 ; *Davies* v. *Spurling*, 1 Russ. & M. 64. Even where a release has been obtained by fraud, the releasor may be debarred from all relief if there have been subsequent dealings which render it impossible to set aside the release *in toto* : *Skilbeck* v. *Hilton*, L. R. 2 Eq. 587. A fraudulent representation as to the effect of a release may now apparently be relied upon as a defence to an action upon the deed : *Hirschfeld* v. Fraud.

Extent of Releases.

London, Brighton and South Coast Rail. Co., 2 Q. B. D. 1.

Though the Court will not disturb an arrangement intended as a compromise of doubtful rights, especially between the members of a family, because the parties had mistaken notions of those rights, it will not permit a release to stand which has been obtained without a full and honest disclosure to the releasor of all the circumstances in the releasee's knowledge, affecting his (the releasor's) actual situation: *Salkeld* v. *Vernon*, 1 Eden, 64; *Harvey* v. *Cooke*, 4 Russ. 34. See also *Cann* v. *Cann*, 1 P. Wms. 728; *Cole* v. *Gibson*, 1 Ves. sen. 506; *Gordon* v. *Gordon*, 3 Swanst. 400; *Rothschild* v. *Brookman*, 2 Dow & Cl. 188; *Portlock* v. *Gardner*, 1 Hare, 595; *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 41; *Oldaker* v. *Lavender*, 6 Sim. 239; *Clifton* v. *Cockburn*, 3 My. & K. 76; *Pickering* v. *Pickering*, 2 Beav. 31; *Stewart* v. *Stewart*, 6 Cl. & F. 911; *Montmorency* v. *Devereux*, 7 Cl. & F. 188; *Persse* v. *Persse*, Id. 279; *Scott* v. *Milne*, 5 Beav. 215; *Lawless* v. *Mansfield*, 1 Dr. & W. 557; *Hore* v. *Becher*, 6 Jur. 93; *Howkins* v. *Jackson*, 2 Mac. & G. 372. As to taxing a solicitor's bill after payment, see *Horlock* v. *Smith*, 2 My. & Cr. 495; *Massie* v. *Drake*, 4 Beav. 433; *Edwards* v. *Meyrick*, 1 Hare, 60.

Oppression.

Releases have also been set aside on the ground that they were extorted by violence or intimidation: *Bowles* v. *Smart*, 1 Sch. & Lef. 209; see *Earl of Chesterfield* v. *Janssen*, 2 Ves. 149.

Of course, a release is no answer where accounts and transactions to which it professes to extend are impeached on the ground of error, fraud, or oppression: *Roche* v. *Morgell*, 2 Sch. & Lef. 721. See also *Salkeld* v. *Science*, 2 Ves. sen. 107; *Phelps* v. *Sproule*, 1 My. & K. 231; *Foley* v. *Hill*, 3 My. & C. 475; *Lloyd* v. *Smith*, 1 Anstr. 258; *Parker* v. *Alcock*, 1 Y. & J. 432; *Kinsman* v. *Barker*, 14 Ves. 579; *Newman* v. *Hutton*, 3 Beav. 114; *Brown* v. *Perkins*, 1 Hare, 564.

Whether general words are controlled by the recital.

Whether the General Words of a Release are controlled by the Recitals.]—It is a long-established rule in the construction of releases that the general words

Effect of Recitals.

of the instrument are liable to be controlled by the recital (*vide ante*, sub tit. "BOND," Vol. II., pp. 303 *et seq.*). Thus, it is laid down, that, if a man receive 10*l.* from another, and by his deed acknowledge the receipt of it, and acquit and discharge him therefrom, and from all actions, suits, debts, duties, and demands; by this release nothing is released except the 10*l.*, for the latter words have reference to the first, and are limited by them: *per Tanfield*, J., 2 Roll. Ab. 409 (A.), pl. 3. So, where A. recovered against B. a judgment for 6000*l.*, and made J. S. and J. D. his executors, and died; B. made C. his executor, and devised a legacy of 5*l.* to J. D., and died; J. D. by deed acknowledged the receipt of the 5*l.* for the legacy from C., and thereby released the said legacy, *and all actions, suits, and demands which he had against C., as executor of B.*, for any matter whatsoever: it was adjudged, that the general words of the release were restrained to the particular occasion, and extended only to the legacy of 5*l.*, and not to the judgment: *Knight* v. *Cole*, Carth. 119; Show. 150; 3 Lev. 269; 3 Mod. 277. See also *Morris* v. *Wilford*, 2 Lev. 214; *Thorpe* v. *Thorpe*, 1 Lord Raym. 235; *Twopenny* v. *Young*, 3 B. & C. 209. The principle was recognised in *Braybroke* v. *Inskip*, 8 Ves. 423, where a release of all claims out of the real and personal estate of a testator was held not to include the moiety of a reversion derived under the will, the recitals disclosing an intention to release a debt only, and not referring to that part of the will which related to the reversion. See also *Ramsden* v. *Hylton*, 2 Ves. sen. 310; *Oliver* v. *Daniel*, 1 Mer. 500, n.; *Bailey* v. *Lloyd*, 5 Russ. 330; *Lindo* v. *Lindo*, 1 Beav. 496.

Payler v. *Homersham.*

A leading authority for this doctrine is *Payler* v. *Homersham*, 4 M. & S. 423, where the question was, whether a joint and several bond given by the defendant and others to the plaintiffs, who were bankers, conditioned for the payment of monies which they should advance to A., was discharged by a release contained in a general composition deed executed by the plaintiffs, as creditors of the defendant. The deed recited that the defendant stood indebted to

Effect of Recitals.

his creditors in the several sums set opposite to their respective names, and that they had agreed to take of him 15*s.* in the pound upon the whole of their respective debts; and then the creditors, in consideration of the said 15*s.* in the pound, paid to them before the execution of the release, respectively released the defendant from all manner of actions, debts, claims, and demands at law and in equity, which they, or any or either of them, had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of the release. Against the plaintiffs' name was set the sum of 2148*l.* 1*s.* 9*d.*, which was the amount of their demand against him on their own account: but no notice was taken of the demand on account of the bond, though at that time a considerable sum of money was due thereon. The Court held that the release was no bar to the action on the bond. Lord *Ellenborough* said: "The general words of a release may be restrained by the particular recital; common sense requires that it should be so; and, in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it." And *Bayley*, J., observed: "There is no doubt but a particular recital in a deed will restrain the general words." See also *Bain* v. *Cooper*, 9 M. & W. 701; *Simons* v. *Johnson*, 3 B. & Ad. 175; *Skiffington* v. *Whitehurst*, 3 Y. & C. 1; *Lindo* v. *Lindo*, 1 Beav. 496; *Lyall* v. *Edwards*, 6 H. & N. 337; *Anon.*, 31 Beav. 310; *Re Ghost's Trusts*, 49 L. T. 588, which was a case where, pecuniary legatees having received dividends on their legacies and given a release to the executors, additional funds subsequently fell in to the estate, and it was held that notwithstanding the release, the legatees were entitled to have their balances made up out of the additional funds. So a release expressed to be made in pursuance of an award will be restrained by the terms of the award: *Upton* v. *Upton*, 1 Dowl. P. C. 400.

Admissibility of parol evidence to explain release.

Parol evidence is inadmissible to enlarge or vary the construction of a release: *Butcher* v. *Butcher*, 1 B. & P. N. R. 113. But this rule does not pre-

clude the admission of parol evidence to explain the state of facts between the parties at the time, on which the extent of the operation of the release must frequently depend: *Brooks* v. *Stuart*, 1 Per. & D. 615.

Effect of Recitals.

Releases to Trustees and Executors.]—It would seem that, on the final distribution of a trust fund, trustees handing over the property to the *cestuis que trust* are generally entitled to a receipt and an acknowledgment that the property is received in full of all demands, but not to a release under seal: see *Chadwick* v. *Heatley*, 2 Coll. 137; *Re Wright's Trusts*, 3 K. & J. 421; *Warter* v. *Anderson*, 11 Hare, 303; *Re Cater's Trusts*, 25 Beav. 366; *Re Foligno's Mortgage*, 32 Beav. 131.

Whether trustees can require a release from *cestui que trust*.

Where a trust had been created by parol for A. for life, with remainder to B. for life, and to pay the expenses of her funeral, with ultimate remainder to B.'s children, and after A.'s death B. and her children joined in calling upon the trustee to pay the trust fund to them, it was held that he was entitled to a release under seal: *King* v. *Mullins*, 1 Drew. 308; but this decision has been doubted: see Lewin on Trusts, 358; see also *Anson* v. *Potter*, 13 Ch. D. 141. In practice, however, it is usual for a release under seal to be given to the trustees on the final winding up of a trust at the expense of the trust estate.

Where an assignment by a *cestui que trust* of his interest in the trust property confers on the assignee a power to give receipts, the trustee cannot require a release from the assignee, who is entitled to payment on producing the deed and tendering a receipt: *Re Foligno's Mortgage*, 32 Beav. 131.

Assignee with power to give receipts.

Where a trustee or executor pays money by direction of the Court, the order is a sufficient protection against subsequent claims on the part of any persons who are before the Court, and accordingly no release from the parties can be required: see *Gillispie* v. *Alexander*, 3 Russ. at p. 137; *Bennett* v. *Lytton*, 2 J. & H. 155; *Walter* v. *Barrett*, 24 Beav. 413; *England* v. *Lord Tredegar*, 35 Beav. 256.

Payment by executor under order of Court.

Releases to Trustees, &c.

Effect of release.

A release by a *cestui que trust* who is *sui juris* and who is fully cognisant of the state of affairs will effectually debar him from his remedies against the trustee in respect of any breach of trust to which the release extends.

Infant incapable of releasing.

An infant, however, is incapable of making such a release, and the Court will continue its protection even after he attains full age, so as to ensure that he has had reasonable opportunity of acquiring full information with reference to the dealings with the trust funds, and he has independent and competent legal advice: *Walker* v. *Symonds*, 3 Sw. 69; *Marsh* v. *Russell*, 3 My. & Cr. 42; *Archer* v. *Hudson*, 7 Beav. 551; *Lloyd* v. *Attwood*, 3 De G. & J. 615; *Seccombe* v. *Saunder*, 34 Beav. 382; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Bainbrigge* v. *Brown*, 18 Ch. D. 188.

Married woman.

It has been seen that a married woman is now able to make an effectual release with respect to property held by her for her separate use either under any settlement or by virtue of statutory enactment, provided she is not restrained from anticipation. Where, however, her power of anticipation is negatived by the terms of a settlement by deed or will, it would seem clear that an express release by her of a breach of trust would be inoperative: see *Davies* v. *Hodgson*, 25 Beav. at p. 186.

Effect of release to trustees.

As a general rule, where there have been any dealings with the trust funds, it seems reasonable that a release by deed should be given to the trustees for their protection; for, although (as has been seen *ante*, p. 42) a release may be vacated on the ground of fraud, mistake, or ignorance as to existence of claims, still it is good until so vacated, and throws on the releasor the burden of showing cause why it should be vacated: see *Fowler* v. *Wyatt*, 24 Beav. 232; *Skilbeck* v. *Hilton*, L. R. 2 Eq. 587; and Lewin on Trusts, 358.

Release by trustees of subsequent settlement.

It not unfrequently happens that on the final distribution of a trust fund it appears that a share has been made the subject of a subsequent settlement, and the trustees of the original settlement are required to transfer the settled share to the trustees

Releases to Trustees, &c.

of the new settlement. It has been decided that in such a case the trustees of the new settlement cannot be required to give a release (see *Re Cater's Trusts*, 25 Beav. 366), and formerly, in the absence of an express power in their settlement to give releases, they might not unreasonably have objected to do so; but now, by sect. 37 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), trustees (whether their trust was created before or after the commencement of the Act) are empowered to give and execute such releases as may seem to them expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith. It is a very general practice in such cases for the trustees of the new settlement to join in giving a release, but should they be unwilling to do so, a release should be taken from the beneficiaries, and the trustees of the settled share should be made parties and concur in the deed for the purpose of acknowledging the receipt of the trust funds handed over to them.

Release to executors.

An executor can only require a simple receipt from a pecuniary legatee: *Re Fortune's Trusts*, 4 I. R. Eq. 351; but it would seem that he is entitled to a release by deed from the residuary legatee when the estate is wound up: see *King* v. *Mullins*, 1 Drew. at p. 311. A release given by a pecuniary legatee to an executor on payment of his legacy in part on the footing that the assets are insufficient for payment in full, will not enure for the benefit of the residuary legatee, if by reason of other funds falling in, the testator's estate ultimately proves to be sufficient to pay further part or the whole of the pecuniary legacies: *Re Ghost's Trusts*, 49 L. T. (N. S.) 588.

Preparation of release.

Form and Contents of Deeds of Release.]—A deed of release is generally prepared by the solicitor of releasee. If the same solicitor acts for both releasee and releasor, he should be careful to explain fully to the parties the effect and extent of the instrument and their respective rights thereunder.

Costs.

In the case of a release to trustees the expense of preparing the deed is usually paid out of the trust

Form of Release.

estate, and is accordingly deducted by the trustees before distributing to the beneficiaries their respective shares in the trust funds; and the fact of such deduction having been made is frequently recited in the deed. In other cases, however, the costs will be paid by all or some of the parties according to arrangement, or to the circumstances of the particular case.

Release may be by deed poll or indenture.

A simple release may be made either by deed poll or indenture, but if the instrument is to contain a covenant for indemnity, or other covenants or provisoes, the release will generally be made by indenture.

Parties.

Where a release is made by indenture, as a general rule, all persons who can give or receive the release, or who are to enter into any obligations or take any benefit under any of the covenants or provisions of the instrument, should be made parties. In the case of a release by deed poll the releasee must be expressly named: see *ante*, p. 33.

Recitals.

If a release is intended to be general, it is as a rule advisable to avoid introducing recitals specifying particular transactions between the parties, as such recitals have frequently been held to operate so as to restrict or control the effect of the instrument: see *ante*, p. 44.

Where the release is to relate to certain particular dealings between the parties it will be necessary that such dealings should be fully and clearly set forth, for (as has been already seen, *ante*, p. 45), no words of release in the operative part, however general, will have the effect of releasing any claims with respect to matters not expressly mentioned in the recitals.

Great care should be taken in framing the recitals of a release to state every material fact with regard to the claims to be released; the origin of the claim should be explained by setting out the terms of the instrument or stating the circumstances of the particular transaction, under or out of which it has arisen; all the subsequent facts which have affected or may affect the claim should be recounted as they have happened; and the title of the releasors to

Form of Release.

give the release, the reasons for giving it, and any limitations or conditions attached to it should be specifically indicated. So where breaches of trust have been committed to which it is intended that the release should extend, they should be particularly stated in the recitals as such, in order to preclude the releasors from subsequently alleging that such breaches were not within their knowledge or contemplation.

Where the claims to be released relate to matters of account of a more or less complicated character, it may be convenient to recite that the accounts are particularly set out in the schedule to the deed, and to append a schedule accordingly.

Operative part.

The operative part will release the trustees or other parties to be released from the particular claims intended to be released, and a general clause is usually added releasing them from any claim, matter, or thing in anywise relating to the premises. Where a release relates to matters in which persons other than the releasors are or may possibly be interested, it will often be advisable that the release should be followed by a covenant by the releasors for indemnity.

Stamp.

A release or renunciation of any property or of any right or interest in property other than upon a sale or by way of security is liable under the Stamp Act, 1870, to a stamp duty of 10*s.*: 33 & 34 Vict. c. 97, Sched.

PRECEDENTS.

I. *MUTUAL RELEASE of all claims by* TWO PERSONS (*a*).

THIS INDENTURE (*b*), made the —— day of ——, 18—, BETWEEN [A. B.], of, &c., of the one part, and [C. D.], of, &c., of the other part, WITNESSETH, that each of them the said [A. B.] and [C. D.] hereby releases the other of them, his heirs, executors, administrators, and assigns, and his and their estates and effects, from all sums of money, accounts, actions, proceedings, claims, and demands whatsoever, for or by reason or in respect of any act, cause, matter, or thing whatsoever, up to the day of the date of these presents. [PROVIDED ALWAYS, that nothing herein contained shall extend to release the said [C. D.], his heirs, executors, administrators, or assigns, or his or their estates or effects, from any claim or demand which the said [A. B.], as executor of the will of [E. F.], of, &c., deceased, now has, or hereafter may have against the said [C. D.] in respect of any accounts or transactions between the said [C. D.] and the said [E. F.], deceased.]

Parties.

Release.

Proviso that release shall not extend to claims of a releasor as executor (*c*).

IN WITNESS, &c.

(*a*) Where a release is intended to be general, it is better to avoid introducing recitals: see *ante*, p. 50. If for any reason it is thought well to insert in a general release a recital of a particular transaction, this recital should be followed by another recital stating that there were other transactions between the parties, as in Precedent III.

(*b*) Stamp, 10*s*.

(*c*) This proviso may be inserted, if it is intended that this release shall not extend to claims by one of the parties against the other, in a representative character: as to which see *ante*, p. 36.

II. *MUTUAL RELEASE of all Claims between a* Partnership Firm *and an Individual* (*d*).

THIS INDENTURE (*e*), made on the —— day of ——, 18—, Between [*partners*], all of ——, merchants and co-partners, of the one part, and [A. B.], of, &c., of the other part, WITNESSETH, that the said co-partners do, and each of them doth hereby, release the said [A. B.], his heirs, executors, administrators, and assigns, and his and their estates and effects, And the said [A. B.] doth hereby release the said co-partners, and each of them, and the heirs, executors, administrators, and assigns, and estates and effects of them, and of each of them, from all sums of money, &c. [*as in last Precedent*].

Parties.

Release.

In witness, &c.

III. *MUTUAL RELEASE of all Claims by* Three Persons, *where a particular Transaction is recited* (*e*).

THIS INDENTURE (*f*), made the —— day of ——, 18—, Between [A. B.], of, &c., of the first part; [C. D.], of, &c., of the second part; and [E. F.], of, &c., of the third part: Whereas the parties hereto have recently been jointly engaged and interested in an undertaking for the construction of, &c. [*describe nature of undertaking*], under an agreement dated, &c., and made between the said [A. B.], of the one part, and [X. Y.], of, &c., of the other part, and several questions have arisen as to the rights and liabilities of the parties hereto as between themselves in respect of the said undertaking: And whereas, for the settlement of such questions, it was agreed that the costs and expenses of the said undertaking should be borne and paid by the parties hereto in the shares and proportions following, that is to say, three equal sixth shares thereof by the said [A. B.], two equal sixth shares thereof by the said [C. D.], and the remaining

Parties.

Recitals: of a particular transaction between the parties;

of agreement to pay expenses and divide profits in certain proportions;

(*d*) See *ante*, p. 52, note (*a*).
(*e*) Stamp, 10*s*.
(*f*) Stamp, 10*s*.

III. Release in respect of Particular Transaction.

one equal sixth share thereof by the said [E. F.], and that they should share the profits of the said undertaking (if any) in the same proportions: AND WHEREAS an abstract of the

of ascertained amount of net profits divisible;

receipts and expenditure in respect of the said undertaking is set forth in the schedule hereunder written, whereby it appears that the net profits divisible in the proportions agreed upon as aforesaid amounted to 600*l.*, and accordingly such amount has been distributed among and received by the several parties hereto in the proportions or sums following, that is to say, the sum of 300*l.* by the said [A. B.], the sum of 200*l.* by the said [C. D.], and the sum of 100*l.* by the said [E. F.], as the parties hereto respectively acknowledge: AND WHEREAS there have been divers other accounts, dealings, and transactions between the parties hereto, all of which have been adjusted and settled: NOW THIS INDENTURE WITNESSETH, that in consideration of the premises, each of them the said [A. B.], [C. D.], and [E. F.] doth, and every two of them do hereby release the others, and each of the others of them, and their and his heirs, executors, administrators, estates and effects, from all sums of money, accounts, actions, proceedings, claims and demands whatsoever, which any one or any two of them the said [A. B.], [C. D.], and [E. F.], now has at any time heretofore or has had or may have had against the others or either of the others of them, for or by reason or in respect of any act, cause, matter, or thing whatsoever, to the date of these presents.

of other transactions.

Testatum.

Release.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

IV. *RELEASE from* CREDITOR *to* DEBTOR *on* RECEIVING *a* SUM *of* MONEY *in* SATISFACTION *of* DISPUTED CLAIMS.

THIS INDENTURE (*g*), made the —— day of ——, 18—,

Parties.

BETWEEN [*releasor*], of, &c., of the one part, and [*releasee*], of, &c., of the other part: WHEREAS the said [*releasor*] has

Recitals:

(*g*) Stamp, 10*s.*

IV. Release by Creditor to Debtor.

from time to time, during several years past, advanced various sums of money to or on the account of the said [*releasee*]; and certain other dealings and transactions have taken place between them, by means whereof the said [*releasee*] became indebted to the said [*releasor*] in a considerable sum of money: AND WHEREAS the said [*releasor*] made certain claims and demands against the said [*releasee*], by reason of the transactions aforesaid, the validity of some part of which claims and demands was denied by the said [*releasee*]; in consequence whereof disputes and differences arose between the said parties respecting the same: AND WHEREAS, for the purpose of terminating and adjusting such disputes and differences, it was lately agreed between the said [*releasor*] and [*releasee*], that the said [*releasee*] should pay to the said [*releasor*] the sum of 500*l.*, in full satisfaction and discharge of all claims and demands whatsoever; and that on receiving the same, the said [*releasor*] should execute to the said [*releasee*] such release as is hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 500*l.* now paid by the said [*releasee*] to the said [*releasor*] (the receipt of which sum he the said [*releasor*] hereby acknowledges), he the said [*releasor*] hereby releases the said [*releasee*], his heirs, executors, and administrators, from All and all manner of sums of money, debts, accounts, actions, proceedings, claims, and demands whatsoever, which he the said [*releasor*] now has, or which he, his heirs, executors, or administrators, but for these presents, could, would, or might, at any time or times hereafter, have, upon or against the said [*releasee*], his heirs, executors, or administrators, for or by reason or on account of any matter, cause, or thing whatsoever, up to and inclusive of the day of the date of these presents.

of dealings between the parties;

disputed claims;

agreement to terminate disputes by payment of a sum of money.

Testatum.

In consideration of a sum of money, creditor releases all claims to debtor.

IN WITNESS, &c.

V. *RELEASE by* REMAINDERMAN *of* ACTIONS *on account of* WASTE COMMITTED *by* TENANT *for* LIFE, *the Releasor's Father* (*h*).

Parties.

THIS INDENTURE (*i*), made the —— day of ——, 18—, BETWEEN [*releasor*], of, &c., of the one part, and [*releasee*], of, &c., of the other part: WHEREAS, &c. [*recite marriage settlement of hereditaments in the parishes of —— and —— (k), in strict settlement*]: AND WHEREAS the said [*releasor*] is the first and only son of the said [*releasee*], and Dame [*wife*], his wife; and he attained the age of twenty-one years on or about the —— day of —— now last past; AND WHEREAS, by an indenture, dated on or about the —— day of —— last, and made between the said [*releasee*], of the first part; the said [*releasor*], of the second part; and [*grantee to uses*], of, &c., of the third part; (and inrolled in the Chancery Division of her Majesty's High Court of Justice, on the —— day of —— last) the said hereditaments comprised in the indenture of settlement hereinbefore recited, have been assured or limited to the use of the said [*releasee*] and his assigns for his life, with remainder to the use of the said [*releasor*], his heirs and assigns, discharged of all estates tail of the said [*releasor*], and all estates, rights, titles, interests, and powers, to take effect after the determination or defeazance of the same estate tail; AND WHEREAS the said [*releasee*] did some time since, with the privity and consent of the said [*releasor*], his son, fell and cut down considerable quantities of timber and other trees, standing and being in or upon the lands and hereditaments comprised in the said indenture of settlement; and did sell and dispose of the same, and apply the produce thereof for his own use; AND WHEREAS, for the purpose of discharging the said [*releasee*] from all actions, proceedings, claims, and demands whatsoever, in respect of the timber and other trees so felled and cut down by him as aforesaid, and the produce thereof, the said [*releasor*] hath agreed to execute the release hereinafter con-

Recitals: of marriage settlement; that releasor is the only son of the marriage;

inrolled assurance for barring the entail;

of waste committed by tenant for life;

agreement for release.

(*h*) As to Waste, see *post*, tit. SETTLEMENTS.

(*i*) Stamp, 10*s*.

(*k*) A short and general description of these hereditaments will be sufficient; it is not necessary to transcribe the description of the parcels from the settlement which would probably be long.

tained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the natural love and affection which the said [*releasor*] hath for the said [*releasee*], his father, he the said [*releasor*] hereby releases the said [*releasee*], his executors, administrators, and assigns, and all the estate and effects whatsoever, of him, them, and every of them, of and from all and all manner of forfeitures, actions, and causes of action, proceedings, accounts, claims, and demands whatsoever, for or by reason or on account of his, the said [*releasee*], having felled and cut down, sold and disposed of such timber and trees, or any part thereof, or for or by reason or on account of any matter, cause, or thing, in anywise relating to the premises.

V. Release by Remainderman to Tenant for Life, for Waste.

Testatum.

Release of forfeitures, actions, &c.

IN WITNESS, &c.

VI. *RELEASE of* DOWER *and* FREEBENCH.

TO ALL TO WHOM (*l*) THESE PRESENTS SHALL COME, [*dowress*], of, &c., widow of [*husband*], late of, &c., SENDS GREETING: WHEREAS the said [*husband*] died intestate on the —— day of ——, 18—, leaving the said [*dowress*] and [*son*], his eldest son, him surviving; AND WHEREAS the said [*husband*] was at the time of his death seised of certain freehold lands and hereditaments in the parishes of —— and ——, in the County of ——, in fee simple, and was also seised of or entitled to certain copyhold lands and hereditaments in the same parishes in customary fee simple; AND WHEREAS the said [*dowress*] has, at the request of the said [*son*], agreed to release all her claim of dower in or out of the same lands and hereditaments in manner hereinafter appearing: NOW KNOW YE AND THESE PRESENTS WITNESS, that the said [*dowress*], in consideration of the love and affection she bears to the said [*son*], hereby releases unto the said [*son*], and to such other person or persons (if any) as the release hereby made may concern, and to their respective heirs and assigns, for ever, all right and title of dower or freebench,

Exordium.

Recitals: of death of husband; of agreement for release.

Testatum.

Release.

(*l*) Stamp, 10*s*.

VI. Release of Dower.

whether at common law or by the custom, which she has, or may have, or be entitled unto, in or out of all or any of the freehold, copyhold, or customary lands, hereditaments, or estates whatsoever, of the said [*husband*], deceased, or the rents, issues, and profits thereof, or any part or parcel thereof, with the appurtenances; and all actions, proceedings, causes of action or proceeding, accounts, claims, and demands whatsoever, for or in respect of any such dower or freebench as aforesaid.

In witness, &c.

VII. *RELEASE of* Powers *of* Jointuring *and* Charging Portions *for younger children* (*m*).

THIS INDENTURE (*n*), made the —— day of ——, 18—,

Parties.

Between [*tenant for life*], of, &c., of the one part, and [*remainderman*], of, &c., of the other part; And Supplemental to an indenture of settlement (hereinafter referred to as the principal indenture), dated, &c., and made between [*parties*]: Whereas [*first tenant for life*] died on the —— day of ——, 18—, And whereas on the —— day of ——, 18—, the said [*tenant for life*] intermarried with [*wife*], formerly [*wife's maiden name*], spinster, and he is now tenant for life in possession of the manors and hereditaments comprised in the principal indenture; And whereas the said [*remainderman*] is the eldest son of the said [*tenant for life*] and [*wife*], and attained the age of twenty-one years on the —— day of ——, 18—, and he is now entitled to an estate tail in the said manors and hereditaments in remainder ex-

Recitals:
of death of first tenant for life;
of marriage, &c., of present tenant for life;
of state of family;

(*m*) By sect. 52 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted that—

"(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power.

"(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act."

As to the law on the subject of the release of powers prior to this Act, see Sugd. Pow., 8th Ed. 47.

A power coupled with a duty is not capable of being released: *Re Eyre*, W. N., 1883, p. 153; 49 L. T. 259.

(*n*) Stamp, 10*s*.

VII. Release of Powers.

pectant on the decease of the said [*tenant for life*], and there has been issue of the said marriage three other children and no more, namely [*give names*], all of whom are infants and unmarried; And whereas the said [*tenant for life*] has recently under the will of [*testator*], of, &c., deceased, dated, &c., and proved, &c., become possessed of or entitled to personal estate of considerable amount and value, out of which he the said [*tenant for life*] intends to make adequate provision for the said [*wife*], if she should survive him, and also for his children now or hereafter to be born other than the said [*remainderman*], and he has accordingly agreed with the said [*remainderman*] to release the powers of jointuring and charging portions given to or vested in him the said [*tenant for life*] by the principal indenture in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said arrangement and in consideration of the premises, He the said [*tenant for life*], hereby absolutely and irrevocably releases unto the said [*remainderman*], his heirs and assigns, and unto all and every other person and persons having or who may hereafter have any estate, right or interest, in to or out of the manors and hereditaments comprised in or which now are or hereafter may or otherwise would be or become subject to the respective powers to be hereby released or any part or parts thereof; First, All that the power or authority which by the principal indenture is given to or vested in the said [*tenant for life*] by deed or will, to charge the said manors and hereditaments, or any part thereof, by way of jointure as therein mentioned, and to limit or create the usual powers and remedies, and to limit a term of years to secure the same; And secondly, All that the power or authority which by the principal indenture is given to or vested in him, to charge all or any of the manors and hereditaments therein comprised, or any part or parts thereof, with the payment, for the portion or portions of his younger child or children, of such sum or sums of money and in such manner as in the same indenture is mentioned, with all such other accompanying authorities as are in that behalf therein contained, And all benefit and advantage of the said several powers and authorities, To the intent that the same shall respectively be absolutely extinguished and cease to be exercisable.

of agreement for release.

Testatum.

Release of powers.

In witness, &c.

VIII. *RELEASE from a* JOINTURE RENTCHARGE *of* PART *of the* LANDS *charged therewith* (*o*), *and* SURRENDER *of* TERM *created for securing the Rentcharge.*

THIS INDENTURE (*p*), made the —— day of ——,
Parties. 18—, BETWEEN [*jointress*], of, &c., widow, of the first part; [*trustee*], of, &c., and [*trustee*], of, &c., of the second part;
Recitals: And [*releasee*], of, &c., of the third part: WHEREAS [*recite*
of settlement; *settlement whereby manors, lands, and hereditaments were limited to A.B. for life, with remainder to the use that his widow should receive a jointure rentcharge of £——, and limitation of term of —— years to trustees for securing the jointure, with remainders in strict settlement in favour of the issue of A.B., with remainder to use of releasee for his life, with remainders over*]; AND WHEREAS the said [A. B.] died on the ——
of death of tenant for life without issue; day of ——, 18—, without having had any issue, leaving the said
of agreement for release; [*jointress*] him surviving; AND WHEREAS the said [*releasee*] is now the tenant for life in possession of the manors and hereditaments comprised in the hereinbefore recited indenture of settlement, and being desirous of selling such of the same hereditaments as are hereinafter released, has requested the said [*jointress*] to release the same from her said jointure rentcharge, which she the said [*jointress*], being satisfied that the remainder of the said hereditaments on which her said jointure rentcharge is charged is a sufficient security for

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(*o*) Formerly, the release from a rentcharge of part of the lands charged altogether extinguished the rentcharge as to all the lands, but by the stat. 22 & 23 Vict. c. 35, sect. 10, a release of part of the lands does not affect the rentcharge except as regards the part released: see *ante*, tit. ANNUITIES, Vol. II., pp. 683 *et seq.*

The release of a jointure is frequently necessary on the sale of part of settled lands. Where the sale is to one purchaser, it will generally be the more convenient course that the jointress should join in the deed of conveyance to release her jointure in favour of the purchaser. But where the sale is to be in lots, it may be better the release should be by a separate deed and to the vendor, who will retain possession of it, and enter into an acknowledgment of the right of the several purchasers to its production, &c.

In either case, except where the release is endorsed upon, or actually annexed to the settlement, a memorandum of the release should be written on the settlement.

(*p*) Stamp, 10*s*.

VIII. Release of Jointure.

of agreement by trustees to surrender the term.

Testatum.

Release of jointure.

the same, has consented to do; AND WHEREAS the said [*trustee*] and [*trustee*] have agreed, at the request of the said [*releasee*] and with the consent of the said [*jointress*], to surrender the said hereditaments hereby released unto the said [*releasee*], in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, for the purpose of enabling the said [*releasee*] to effectuate the said sale, and in consideration of the premises, she the said [*jointress*] hereby releases ALL AND SINGULAR the messuages, lands, and hereditaments particularly described in the schedule hereunder written, from the said jointure rentcharge of £—— so charged thereon as aforesaid, And from all actions, proceedings, accounts, claims, and demands, whatsoever for or in respect thereof, or any part thereof, and all powers and remedies for recovering the same: [PROVIDED ALWAYS, that nothing herein contained shall be deemed nor shall operate to extinguish, release, or prejudicially affect the said jointure rentcharge of £——, or any part thereof, as respects any of the manors, lands, and hereditaments comprised in the hereinbefore recited indenture of settlement, other than the hereditaments and premises hereby released.] And the said [*jointress*] hereby covenants with the said [*releasee*] that she the said [*jointress*] has not done, omitted, or knowingly suffered or been party or privy to anything whereby she is in anywise hindered from releasing the said hereditaments hereby released, or any part thereof, from the said jointure rentcharge of £——, and the powers and remedies for recovering the same in manner aforesaid: AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, the said [*trustee*] and [*trustee*], at the request and by the direction and appointment of the said [*jointress*], Do, and each of them DOTH, hereby surrender, and as trustees and trustee convey unto the said [*releasee*], his heirs and assigns, ALL THOSE the messuages, lands, hereditaments, and premises, particularly described in the schedule hereunder written and hereinbefore expressed to be hereby released from the said jointure rentcharge, with their appurtenances; To THE INTENT, that the residue now unexpired of the said term

Proviso that release shall not extinguish jointure (*q*).

Covenant against incumbrances.

Further *testatum.*

Trustee, by the direction of the releasor and releasee, surrenders

all the estate.

(*q*) This proviso may now be omitted if desired, see last preceding note.

VIII. Release of Jointure.

of —— years, created by the hereinbefore recited indenture of settlement, may be merged and extinguished in the freehold and inheritance of the same premises.

In witness, &c.

The Schedule above referred to.

IX. *RELEASE of* Rentcharge *to* Owner *in* Fee *of* Lands *charged therewith, so as to keep the Rentcharge on foot.*

Parties.

THIS INDENTURE (*r*), made the —— day of ——, 18—, Between [*owner of rentcharge*], of, &c., of the first part; [*owner of lands charged*], of, &c., of the second part; And [*trustee*], of, &c., of the third part: Whereas, by an

Recitals: of creation of rentcharge;

indenture dated, &c., and made between [*parties*] for the consideration therein mentioned, All those messuages, lands, tenements, and hereditaments, situate in the parishes of —— and ——, in the County of ——, particularly described in the schedule hereunder written, were conveyed unto the said [*former landowner*], and his heirs, to the use that the said [*owner of rentcharge*], his heirs and assigns, might receive a perpetual rentcharge of £——, charged upon and issuing out of all the same hereditaments and premises and every part thereof, and payable as therein is mentioned, And subject and charged as aforesaid to the use of the said [*former landowner*], his heirs and assigns; And whereas the said [*former landowner*] duly made and executed his will, dated, &c., and thereby amongst other things devised all the said hereditaments and premises charged as aforesaid with the said rentcharge unto the said [*owner of lands*], his heirs and assigns;

of devise of lands charged;

of death of testator, and proof of will;

And whereas the said [*former landowner*] died on the —— day of ——, 18—, without having revoked or altered his said will; And the same was on the —— day of ——, 18—, duly

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(*r*) Stamp, *ad valorem* on the amount of the consideration money as a conveyance on sale, see *post*, sub tit. Stamp Duties, Vol. VII., p. 118.

IX. Release of Rentcharge.

proved in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice by [*executors*], the executors named in the said will: And whereas the said rentcharge has been duly paid by the said [*owner of land*] to the said [*owner of rentcharge*], up to the date of these presents, as the said [*owner of rentcharge*] doth hereby acknowledge; And whereas the said [*owner of land*] has agreed with the said [*owner of rentcharge*] for the purchase of the said rentcharge of £——, for the sum of £——, and has requested that the same may be conveyed to the said [*trustee*] in trust for him the said [*owner of land*], in manner hereinafter expressed: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*owner of rentcharge*] by the said [*owner of land*] (of which sum of £—— the said [*owner of rentcharge*] hereby acknowledges the receipt), He, the said [*owner of rentcharge*], at the request of the said [*owner of land*], hereby grants, and as beneficial owner conveys unto the said [*trustee*] and his heirs, All that perpetual yearly rentcharge of £——, so created by the hereinbefore recited indenture of the —— day of ——, 18—, as aforesaid, and all future claim and demand of him the said [*owner of rentcharge*], and his heirs, to and concerning the said rentcharge and premises, together with all powers and remedies for securing and recovering payment thereof, To hold the same premises Unto and to the use of the said [*trustee*], his heirs and assigns, Upon trust for the said [*owner of land*], his heirs and assigns, To the intent that the said rentcharge, and the fee simple and inheritance thereof may not be extinguished or merged in, but may be kept distinct from the hereditaments and premises charged therewith and the fee simple and inheritance thereof.

of payment of rentcharge;

of agreement for purchase of rentcharge.

Testatum.

Conveyance of rentcharge.

Habendum.

To use of trustee to keep rentcharge on foot.

In witness, &c.

The Schedule above referred to.

X. *RELEASE by a* Mortgagee *of* Part *of* Settled Lands *intended to be* sold *by the* Tenant for Life *under his Statutory Powers.*

Parties.

THIS INDENTURE (*s*), made the —— day of ——, 18—, Between [*mortgagee*], of, &c., of the first part; [*tenant for life*], of, &c., of the second part; And [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: Whereas,

Recitals: of mortgage;

by an indenture of mortgage, dated the —— day of ——, 18—, and made between [*parties*], the hereditaments hereinafter described were, with other hereditaments, conveyed and assured to the use of the said [*mortgagee*], in fee simple by way of mortgage for securing payment to him of the sum of £——, with interest thereon at the rate of —— per cent. per annum;

of settlement of mortgaged lands;

And whereas, by an indenture of settlement dated the —— day of ——, 18—, the said hereditaments comprised in the hereinbefore recited indenture of mortgage, were limited and assured (subject to the said indenture of mortgage, and to the sum of £—— and interest for the same thereby secured) unto the said [*trustee*] and [*trustee*], to the use of the said [*tenant for life*] for his life, with divers remainders over;

of state of mortgage debt;

And whereas the said sum of £——, together with some interest, is now owing to the said [*mortgagee*] on the security of the said indenture of mortgage;

of contract for sale of lands, and consent of mortgagee to release them.

And whereas the said [*tenant for life*], as such tenant for life as aforesaid of the settled lands comprised in the said indentures of mortgage and settlement respectively, has contracted for sale of part thereof, being the hereditaments hereinafter described, in lots to several purchasers, and upon the treaty for the said sales the said [*mortgagee*] consented that such sales should be made free and discharged from the said mortgage, he, the said [*mortgagee*], being satisfied that the said sum of £——, and the interest now and hereafter to become due thereon, are sufficiently secured upon the hereditaments comprised in the said indenture of mortgage, other than the hereditaments hereinafter described and hereby released;

of agreement for release;

And whereas, for the purpose of effectuating the said sales, the said [*mortgagee*] has agreed, at the request of the said [*tenant for life*], to release

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(*s*) Stamp, 10*s*. The observations as to releases of charges on a sale in note (*o*), *ante*, p. 60, apply *mutatis mutandis* to this Precedent.

the hereditaments hereinafter described so contracted to be sold as aforesaid in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration of the premises, he the said [*mortgagee*], at the request and by the direction of the said [*tenant for life*], hereby grants, releases, and as mortgagee conveys unto the said [*trustee*] and [*trustee*] and their heirs, All those several messuages and closes of land, &c. [*describe parcels*], TO HOLD the same premises UNTO the said [*trustee*] and [*trustee*], and their heirs, freed and discharged from all principal monies and interest secured by and from all claims and demands under or by virtue of the said indenture of mortgage, TO THE USES, upon the trusts, and with, under, and subject to the powers, provisoes, and agreements, in and by the said indenture of settlement declared and contained of and concerning the same premises, or such of the same uses, trusts, powers, provisoes, and agreements, as are now subsisting and capable of taking effect.

X. **Release by Mortgagee.**

Testatum. Release.

Habendum, to trustees to uses of settlement;

IN WITNESS, &c.

XI. *RELEASE by Deed-Poll, by a* LEGATEE *and her* HUSBAND, *of* LANDS *charged with payment of two* PECUNIARY *Legacies.*

TO ALL TO WHOM THESE PRESENTS SHALL COME (*t*), [*husband of legatee*], of, &c. (*u*), and [*wife*], respectively SEND GREETING. WHEREAS [*testator*], late of ——, by his will dated the —— day of ——, (amongst other things) bequeathed to his niece, the said [*wife*], therein described as the wife of the said [*husband*] the sum of 1500*l.* and he directed that the same, with interest for the same, after the rate of —— per

Recitals: of will bequeathing legacy charged on land;

(*t*) Stamp, 10*s.*

(*u*) The husband is made a party to this deed, which will require acknowledgment, on the assumption that the wife was married, and that her title to the legacy accrued before the Married Women's Property Act, 1882, and also that she is not under the terms of the will entitled to the legacy for her separate use: see Sugd. Pow., 8th Ed. 92; otherwise, neither the husband's concurrence, nor acknowledgment of the deed will be necessary: see *ante*, p. 29.

XI. Release of Lands Charged with Legacies.

centum per annum, from the day of his death, should be charged on and payable out of certain lands and hereditaments at ——, in the county of ——, forming part of his real estate; and the said testator by his said will gave and devised the said lands and hereditaments so charged as aforesaid to [*devisee*] of, &c., in fee simple; and the said testator thereby appointed [*executors*], executors thereof: And whereas the said [*testator*], deceased, by a codicil dated the —— day of ——, to his said will (amongst other things) bequeathed unto the said [*wife*], the sum of 1000*l.* in addition to what he had given to her by his said will, and to be charged and payable as was directed with respect to original legacy, and he thereby in all other respects confirmed his said will: And whereas the said [*testator*], deceased, by a second codicil dated the —— day of ——, to his said will, appointed [*executor*], of, &c., one of his trustees and executors jointly with those named in his said will; And whereas the said [*testator*] died on the —— day of ——, 18—, without having altered or revoked the said two legacies of 1500*l.* and 1000*l.*, so by him bequeathed to the said [*wife*], by his said will and first codicil respectively as aforesaid: And whereas, [*recite probate of will and codicils*]: And whereas the said legacies of 1500*l.* and 1000*l.* respectively still remain unpaid, but all interest thereon has been duly paid up to the —— day of —— last, as the said husband and wife hereby acknowledge: And whereas the said devisee being desirous of selling certain closes of land and hereditaments particularly described in the schedule hereunder written, being part of the said lands and hereditaments so devised to him as aforesaid, has requested the said [*husband*] and [*wife*] to release the same from the said legacies of 1500*l.* and 1000*l.* respectively in manner hereinafter appearing, which they the said [*husband*] and [*wife*] have consented to do, being satisfied that the residue of the hereditaments on which the said legacies are charged are a sufficient security for the same and the interest thereon respectively: NOW THESE PRESENTS WITNESS, that the [*husband*] and [*wife*], his wife, do, and each of them doth, hereby release All the several closes of land and hereditaments situate at —— in the county of ——, particularly described in the schedule hereunder written, and all other, if any, the lands and hereditaments charged with payment of the said legacies or

and appointing executors;

codicil, giving further legacy;

second codicil, appointing another executor;

death of testator, and probate;

payment of interest;

agreement for release.

Testatum.

Husband and wife respectively acknowledge receipt of legacies of 1500*l.* and

either of them or interest thereon respectively, and also the said [*devisee*] his heirs, executors, and administrators, and also the estate of the said [*testator*] deceased, from the said several legacies or sums of 1500*l.* and 1000*l.*, and the interest thereon respectively, and every part thereof respectively, and from all actions, proceedings, claims, and demands for or in respect of the same respectively.

XI. **Release of Lands Charged with Legacies.**

1000*l.*, and release executors from all demands in respect thereof.

In witness, &c.

The Schedule above referred to.

XII. *RELEASE of all Demands from a* Residuary Legatee, *after* attaining the *Age of* Twenty-one years, *to Executors and Trustees.*

THIS INDENTURE (*w*), made the —— day of ——, 18—, Between [*legatee*], of, &c., and [*executors*], of, &c.: Whereas [*testator*], late of ——, by his will, bequeathed unto his sister, [A.S.], and her assigns, during the residue of his term in the leasehold property therein mentioned, if she should so long live, an annuity of 30*l.*, and charged the same property therewith; And bequeathed to his partner [R.T.] all his household goods, plate, linen, and furniture, on condition that the money which would become payable by the said [R. T.] for the said testator's interest in their stock in trade, should be paid by four equal payments, at the end of the first six, twelve, eighteen, and twenty-four calendar months, from the day of his decease; And he gave the residue of his personal estate (subject to various legacies), unto the said [*executors*], their executors, administrators, and assigns, in trust for the maintenance of the said [*legatee*], his nephew, (then of the age of thirteen years), until he should attain his majority; and then, in trust for the said [*legatee*], his executors, administrators, and assigns; And whereas the said will was proved on the —— day of ——, in the

Parties.

Recitals: of will;

of probate and payment of annuity;

(*w*) Stamp, 10*s.*

XII. Release by Residuary Legatee on Attaining Majority.

District Registry at —— of the Probate Division, by the said [*executors*], the executors therein named, who have paid the said annuity of 30*l.* up to Lady-day last past, inclusive, and have paid all the debts and funeral and testamentary expenses of the said testator: AND WHEREAS, the said [*legatee*] having attained the age of twenty-one years, the said [*executors*] have this day assigned unto him the said leasehold property (but subject to the said annuity) and have delivered to him all deeds and writings relating thereto which were in their custody or power; AND WHEREAS the said [*executors*] have this day stated and settled with the said [*legatee*] a true, full and particular account in writing of and concerning all their payments, receipts and disbursements, as such trustees and executors as aforesaid, up to this day, so far as he is interested therein; which account has been signed by the said [*legatee*], And by the said account there appears to be due to the said [*legatee*] in respect of the said residue the sum of 5000*l.*; AND WHEREAS the said [*executors*] have duly paid to the said [*legatee*] the sum of 4850*l.*, being the amount of the said residue after deducting therefrom 150*l*, for legacy duty thereon at the rate of 3*l.* per centum; NOW THIS INDENTURE WITNESSETH that in consideration of the premises, the said [*legatee*] hereby releases unto the said [*executors*] and each of them, all actions, proceedings and causes of action or proceeding, claims and demands whatsoever by virtue of the will of the said testator or in respect of his real or personal estate, AND the said [*legatee*] hereby covenants with the said [*executors*] to indemnify them, and each of them, their heirs, executors and administrators, and all other persons whomsoever, from all succession duty payable in respect of the said leasehold hereditaments, and from all responsibility in respect of such assignment and payment respectively.

of assignment of leaseholds;

of settlement of accounts;

of payment of residue, deducting legacy duty.

Testatum.

Release.

Covenant of indemnity.

IN WITNESS, &c.

XIII. *GENERAL RELEASE from a* RESIDUARY *Legatee to a surviving Executor, with special* RECITALS *of Transactions in the Trust, by which Losses had accrued, and the Executors had incurred Responsibility;* COVENANT OF INDEMNITY *against the* COVENANTS *in Leases assigned by the Executor to the Legatee.*

THIS INDENTURE (*x*), made the —— day of ——, 18—, BETWEEN [*legatee*], of, &c., of the one part, and [*surviving executor*], of, &c., of the other part: [*Recite the will of the testator, whereby the whole of his real and personal property was devised and bequeathed to his executors, in trust to sell and convert the same, and invest the monies arising therefrom on government or real security, for the benefit of the testator's widow for life, and, after her decease, in trust for the legatee, his nephew, absolutely; also, the death of the testator without revoking or altering his will, and probate*]; AND WHEREAS the said [*widow*] died on the —— day of ——, having from time to time during her life received from the said [*executors*] the dividends and interest arising from the funds in which the trust monies constituting the residuary personal estate of the said [*testator*], deceased, had been invested; and also the rents and income arising from so much of the said trust estate as from time to time remained unsold and unconverted; AND WHEREAS the said [*deceased executor*], died on the —— day of —— last; AND WHEREAS the said [*surviving executor*], during the life of his co-executor, the said [*deceased executor*], did not personally act or interfere in the management of the affairs of the said trust estate, except for the purpose of executing conveyances and transferring funds, and performing other acts of a similiar nature, at the request of the said [*deceased executor*], who had been the confidential agent and adviser of the said testator, and was more intimately conversant with his affairs than the said [*surviving executor*], on which account the said [*deceased executor*], with the consent and acquiescence of the said [*surviving executor*], assumed the entire and exclusive management of the said trust estate; AND WHEREAS the said [*surviving executor*], having great confidence in his co-executor, the said [*deceased executor*], did

Parties.

Recitals: of will, &c.;

of the death of legatee for life;

of death of releasee's co-executor;

that the deceased co-executor had assumed the principal management;

that the releasee had placed monies

(*x*) Stamp, 10*s*.

XIII. Release by Residuary Legatee to a Surviving Executor.

not obtain from him full and satisfactory explanations as to the intended employment and application of the monies which from time to time, by the means aforesaid, were placed at the sole and exclusive disposal of the said [*deceased executor*]; And whereas, upon the decease of the said [*deceased executor*], an investigation of the affairs of the said trust estate took place, when it was discovered that he had applied to his own use certain sums of money, the produce of portions of the said trust property which had been sold by the said [*deceased executor*] and [*surviving executor*], as aforesaid, and had otherwise neglected the due execution of the trusts created by the said recited will; particularly, in omitting to sell and convert into money certain parts of the said residuary trust estate; by reason whereof the said [*widow*] had received out of the said trust property an annual income considerably exceeding what she would have been entitled to if the said trust property had been duly converted and the produce thereof invested pursuant to the trusts of the said will (*y*); and the value and amount of the reversionary interest of the said [*legatee*], under the said will, had been proportionally diminished and deteriorated; And whereas the estate of the said [*deceased executor*], at the time of his decease, was insolvent, and wholly inadequate to the payment of his debts; and, therefore, the said [*legatee*] called upon and required the said [*surviving executor*] to make good the said losses and deficiencies which accrued to the said trust estate by reason of the transactions aforesaid; And whereas the said [*surviving executor*] having declared his intention to resist the said claim of the said [*legatee*], the said [*legatee*] commenced an action in the Chancery Division of Her Majesty's High Court of Justice against the said [*surviving executor*] and the administrator of the personal estate of the said [*deceased executor*], for the purpose principally of charging the said [*surviving executor*] with the losses and deficiencies arising from the hereinbefore-recited transactions in the said trust; And whereas, for the purpose of preventing further litigation between the said [*surviving executor*] and

at the disposal of his co-executor, without information as to the application thereof;

that various breaches of trust had been discovered to have been committed by the deceased executor;

that deceased executor had died insolvent;

that legatee had commenced an action in Chancery Division against the surviving executor, &c.;

agreement for compromise;

(*y*) When breaches of trust have been committed, to which the release is meant to extend, it is better to recite them, in order to preclude the allegation of their not having been known to, or in the contemplation of, the releasor. See *ante*, p. 51.

XIII. Release by Residuary Legatee to a Surviving Executor.

[*legatee*], and in regard that the said [*legatee*] is now fully convinced that the said [*surviving executor*] was ignorant of the breaches of trust committed by the said [*deceased executor*], and that the conduct of the said [*surviving executor*] arose entirely from an erroneous conception of the duties legally devolving upon him as such executor as aforesaid, and not from any corrupt or dishonourable motive, the said [*legatee*] has consented to enter into the following arrangement and compromise with the said [*surviving executor*]: (That is to say), That the said [*surviving executor*] should pay the bill of costs of the solicitor of the said [*legatee*], as well of the said action, as otherwise for business transacted in relation to the said claim of the said [*legatee*] against the said [*surviving executor*]; and should, at the costs and charges of the said [*surviving executor*], deliver up and effectually assign and transfer to the said [*legatee*], all and singular the trust estates, monies, and property now in the hands of the said [*surviving executor*], and that thereupon the said [*legatee*] should not further prosecute the said action, and should also execute to the said [*surviving executor*] a general release in manner hereinafter contained; and it was further agreed by and between the said [*legatee*] and [*surviving executor*], that, inasmuch as part of the said trust estate consisted of leasehold property, held subject to the payment of rents, and to the observance and performance of certain covenants, to which the said [*surviving executor*], as the personal representative of the said [*testator*], deceased, would continue liable notwithstanding the assignment thereof intended to be made to the said [*legatee*], the said [*legatee*] should execute to the said [*surviving executor*] such covenant of indemnity concerning the same as is hereinafter contained (*z*); And, lastly, it was agreed that the costs of these presents, and otherwise attending the perform-

(*z*) It is clear that the executor of a lessee assigning leaseholds to a legatee, whether specific or residuary, is entitled to an indemnity against the rent and covenants of the lease, to which, notwithstanding the assignment, he continues liable to the extent of the assets that have reached his hands: *Simmons* v. *Bolland*, 3 Mer. 547. In the case of an assignment to a *purchaser* no such protection is needed, see stat. 22 & 23 Vict. c. 35, s. 27.

It seems better to introduce the covenant into this deed than into the deed of assignment, as that is delivered up to the legatee, though, as between a vendor and purchaser, the covenant is generally inserted in the assignment.

XIII. Release by Residuary Legatee to a Surviving Executor.

execution of agreement by release;

ance of the said agreement, should be paid by the said [*surviving executor*]; And whereas, in pursuance of the said agreement, the said [*surviving executor*] has paid the bill of costs of Mr. ——, the solicitor of the said [*legatee*], in the said action of "[*plaintiff*] v. [*defendant*]," and otherwise concerning the matters aforesaid, amounting to the sum of £——;

of assignment of leaseholds of even date;

And whereas, in further pursuance of the said agreement, by indenture of even date herewith, made between the said [*surviving executor*] of the one part, and the said [*legatee*] of the other part, the said [*surviving executor*] has assigned to the said [*legatee*] all and singular the messuages, gardens, and pieces or parcels of ground, situate at ——, lately belonging to and in the occupation of the said [*testator*], deceased, and held by him under two indentures of lease, one dated the —— day of ——, for the term of —— years, commencing from the —— day of ——, at the yearly rent of £——, and the other of them dated, &c., and subject to certain covenants and agreements on the part of the said [*testator*], his executors, administrators, and assigns, to be observed and performed;

of the transfer of funds;

And whereas, in further pursuance of the said agreement, the said [*surviving executor*] has this day transferred into the name of the said [*legatee*] the sum of £—— $2\frac{3}{4}$ per cent. Consolidated Bank Annuities, and also the sum of £—— Bank Stock, constituting other part of the property of the said [*testator*], deceased;

payment of money balance.

And whereas, in further pursuance of the said agreement, the said [*surviving executor*] has this day paid to the said [*legatee*] the sum of £——, being the balance remaining in the hands of Messrs. —— & Co., of ——, bankers, to the credit of the said trust estate of the said [*testator*], deceased; which sum of £—— constitutes the entire residue of the said trust property in the hands of the said [*surviving executor*] as aforesaid; And whereas, it has been agreed that the said [*legatee*] shall enter into the covenants on his part hereinafter contained in regard to the said action, and also in regard to the rents and covenants reserved and contained by and in the said indentures of lease respectively:

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in further pursuance of the said agreement on the part of the said [*legatee*], and in consideration of the premises, he the said [*legatee*] hereby releases the said [*surviving executor*], his heirs, executors, and administrators, of and from all and every the trusts reposed in the said [*deceased*

XIII. Release by Residuary Legatee to a Surviving Executor.

executor] and [*surviving executor*], in and by the hereinbefore-in-part-recited will of the said [*testator*], as such trustees and executors as aforesaid, and which devolved upon and became vested in the said [*surviving executor*] by survivorship as aforesaid, And of and from all and all manner of actions, proceedings, causes of action or proceeding, sums of money, accounts, judgments, damages, claims, and demands whatsoever, which the said [*legatee*] now has, or which he, his heirs, executors, or administrators, may hereafter have, claim, or be entitled unto, upon or against the said [*surviving executor*], his heirs, executors, or administrators, for or by reason or on account of the trusts contained in the hereinbefore-recited will of the said [*testator*], deceased, or of any acts, proceedings, neglects, or defaults of him the said [*surviving executor*], either concurrently with the said [*deceased executor*] in his lifetime, or solely since his death, or in any other manner howsoever, or for or by reason or in consequence of any losses, damages, or expenses which may have happened or accrued to, or have been incurred by, the trust estate of the said [*testator*], deceased, or to or by the said [*legatee*] by reason or in consequence of such acts, proceedings, neglects, or defaults, or of any other matter, cause, or thing incidental to, or connected with, the said trust estate, or the will of the said testator, whether the same have been particularly mentioned or referred to in the recitals of this present indenture or not (*a*): AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, he the said [*legatee*] hereby covenants with the

Further *testatum*.

(*a*) As to the doctrine that the general words of a release are restrained by the recital, see *ante*, pp. 44 *et seq.* If the releasing party has any claims against the releasee in his own right, to which the release is not to extend, the following proviso, though not, it is conceived, necessary (see *ante*, p. 37), may be usefully added, for the purpose of excluding all doubt:

"PROVIDED ALWAYS, and it is hereby declared that nothing herein contained shall extend to release or prejudice any claim or demand which the said [*legatee*] now has, or which he, his executors or administrators, may hereafter have against the said [*surviving executor*], in any manner other than in the capacity or character of legatee named in the will of the said [*testator*], deceased."

Variation where release is restrained to claims by the releasor as legatee.

XIII. Release by Residuary Legatee to a Surviving Executor.

said [*surviving executor*], that he the said [*legatee*] will not, nor shall his executors or administrators, or any person or persons claiming through, under, or in trust for him, them, or any of them, in any way prosecute, carry on, continue, or revive the said action of "[*plaintiff*] v. [*defendant*]," or any action or proceeding for such relief as is claimed in the said action so commenced by him the said [*legatee*] as aforesaid; but that he or they will if and whenever required by the said [*surviving executor*] his executors or administrators concur in any applications or other proceedings which may be necessary for staying proceedings in the said action, or causing the same to cease and be discontinued; AND FURTHER, that he, the said [*legatee*], his heirs, executors, and administrators, will, from time to time, and at all times hereafter, keep indemnified the said [*surviving executor*], his heirs, executors, and administrators, And also the heirs, executors, or administrators for the time being of the said [*testator*], deceased, from and against all sums of money, costs, charges, damages, and expenses whatsoever, which he or they shall or may pay, incur, or be put unto by reason or on account of the non-observance or non-performance by the said [*legatee*], his executors, administrators, or assigns, of any or either of the covenants contained in the leases of the —— day of ——, 18—, and the —— day of ——, 18—, respectively hereinbefore referred to, or either of them, and on the lessee's part to be observed and performed, concerning the premises comprised in the indenture of assignment of even date herewith, executed by the said [*surviving executor*] to the said [*legatee*] as aforesaid, or of any other matter or thing in anywise relating thereunto.

Covenant not to prosecute the action;

and for indemnity.

IN WITNESS, &c.

XIV. *RELEASE and* INDEMNITY *by some of the Persons beneficially interested under a Will, to the* TRUSTEES CARRYING ON *the* TESTATOR'S TRADE *without authority.*

THIS INDENTURE (*b*), made on the —— day of ——, 18—, BETWEEN [A. B.], of &c., and [E.] his wife, and [J. B.], of, &c., of the one part, and [P. B.], [S. B.], and [J. L.], (*the trustees*), of &c., of the other part: WHEREAS [*testator*], by his will, gave all his real and personal estate unto and to the use of the said [P. B.], [S. B.], and [M. N.], their heirs, executors, administrators, and assigns, upon trust for sale and conversion, and, after payment of his debts and legacies, upon trust to pay one equal fifth part of the residue of the produce of his said estate unto his sister, the said [E. B.], for her separate use, one other fifth part unto his brother [G. B.], the like unto his brother, the said [J. B.], the like unto the said [P. B.], (*one of the trustees*), and the like unto his niece [S. M.], if she should attain her majority, but if she should die under age, then equally among such of the said [E. B.], [G. B.], [J. B.], and [P. B.], as should then be living, the share of the said [E. B.], to be for her separate use: AND WHEREAS the said will was proved at ——, on the —— day of ——, by the said [P. B.], and [S. B.], the surviving executors therein named; And the said [J. L.] was, on the —— day of ——, duly appointed to be a trustee under the said will, in the room of the said [M. N.]: AND WHEREAS the good-will of the trade of a ——, carried on by the said testator until his death, has been carried on by the said [P. B.], and [S. B.], and is intended to be carried on by the said trustees until the same can be advantageously sold; but it is apprehended that the said will does not authorize the said trustees to carry on the said trade, or in other respects to act to the best advantage in disposing of the said trust property: AND WHEREAS the said [S. M.] is of the age of sixteen years, and the said [G. B.], is not of sound mind: NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, each of them, the said [A. B.], and [E.] his wife, [J. B.], and [P. B.] (*one*

Parties.

Recitals: of will;

of probate;

of appointment of new trustee;

that trustees have carried on testator's trade;

of incapacity of two of the *cestuis que trust.*

Testatum.

Authority to

(*b*) Stamp, 10*s.*

XIV. Release and Indemnity to Trustees Carrying on Testator's Trade.

of the trustees), hereby declares that it shall be lawful for, but not incumbent on, the said [*trustees*], and other the trustees or trustee for the time being under the said will, to carry on the said trade, and do all usual acts for that purpose until they or he shall receive from the said [E. B.] and [J. B.], or either of them, or the executors, administrators, or assigns, of either of them, or of the said [P. B.], notice in writing to discontinue the same: And to do such acts in carrying on the said business or in relation thereto, and to sell, demise, and deal with the said real and personal estate of the said testator, or any part thereof, at such time or times, and upon such terms, on credit or otherwise, as shall from time to time be authorized in writing by the said [A. B.], and [E.] his wife, [J. B.], and [P. B.], or any one or more of them: Provided that the authority so to be given, and the following release and covenant for indemnity against the consequences of any acts done in pursuance of such authority, shall not have any operation against, or be binding upon, any of the said parties hereto, or his or her property or interest, except so far as he or she individually may have given such authority; And the said [A. B.], and [E.] his wife, and [J. B.], hereby release the said [*trustees*], and each of them, his heirs, executors, and administrators, from all present and future trusts, actions, proceedings, and claims against them or any of them, on account of the said trade having been so carried on as aforesaid, or of any involuntary loss which has been or may be sustained in the said trade, or by reason of anything to be done in pursuance of such authority as aforesaid; And the said [A. B.] and [E.] his wife, and [J. B.] jointly and severally covenant with the said [*trustees*] jointly and severally, And the said [P. B.] covenants with the said [S. B.] and [J. L.], jointly and severally, That the said covenanting parties respectively, and their respective heirs, executors, and administrators will at all times indemnify the said [*trustees*] respectively, and their respective heirs, executors, administrators, and assigns against all losses and liabilities consequential on such trading as aforesaid, or on any acts to be done in pursuance of these presents or of such authority as aforesaid; And that the said trustees or trustee for the time being may retain, or allow or pay to their or his co-trustee or co-trustees, or to the representatives of any deceased trustee, out of the respective shares of the said covenanting parties in the said trust property, compensation for

trustees to carry on trade;

to do such acts as competent *cestuis que trust* shall authorise.

Each *cestui que trust* to be bound by such acts only as he shall authorise.

Release by *cestui que trust.*

Covenant of indemnity.

Trustees to be indemnified out of the shares of the covenanting parties.

all losses as they or he may sustain as aforesaid, and that such compensation shall be a specific charge on such shares, in priority to all other charges.

XIV. Release and Indemnity to Trustees Carrying on Testator's Trade.

IN WITNESS, &c.

XV. *RELEASE by* RESIDUARY LEGATEES *of their* SHARES *in a* LEGACY, *in* CONFIRMATION *of a* GIFT *void for Remoteness.*

THIS INDENTURE (*c*), made the —— day of ——, 18—, BETWEEN [A. B.], of, &c., and [C. D.], of, &c., of the one part, and [Y. Z.], of, &c., and [X. Z.], of, &c., of the other part [*recitals stating will bequeathing* 10,000*l.* *to* [*W. Z.*] *for life, with remainder to his wife* [*Y. Z.*] *for her life, with remainder to their children absolutely in equal shares, to vest at* 25 *years of age, giving residuary personal estate to* [*A. B.*] *and* [*C. D.*], *and appointing them executors; death of testator and probate of his will*]: AND WHEREAS the said [Y. Z.] died on the —— day of ——, 18—, leaving her two only children, the said [Y. Z.] and [X. Z.] her surviving; AND WHEREAS it is apprehended that the gift contained in the said will of the said [*testator*] in favour of the children of the said [W. Z.] and [V. Z.] was void for remoteness, and consequently that the reversion immediately expectant on the death of the survivor of the said [W. Z.] and [V. Z.] in the said sum of 10,000*l.* became vested in the said [A. B.] and [C. D.] as the residuary legatees under the said will; AND WHEREAS the said [A. B.] and [C. D.], being desirous of effectuating the intention of the said testator in regard to the reversion expectant as aforesaid in the said sum of 10,000*l.*, have determined and agreed to assign and release their respective shares and interests of and in the same sum, and the stocks, funds, shares, and securities in or upon which the same may be invested, and the dividends, interest, and annual produce thereof, unto the said [Y. Z.] and [X. Z.], in manner hereinafter appearing: NOW THIS INDENTURE WITNES-

Parties.

Recitals:

of will, death of testator, &c.;

of state of family;

of question as to validity of bequest;

of intent to release claim to void bequest.

Testatum.

(*c*) Stamp, 10*s.*

XV. Release in Confirmation of Void Legacy.

Release.

SETH (*d*), that in pursuance of the said agreement, and in consideration of the premises, they the said [A. B.] and [C. D.] do, and each of them doth hereby assign and release unto the said [Y. Z.] and [X. Z.] and their respective executors, administrators, and assigns, All the parts, shares, and interests of them the said [A. B.] and [C. D.] respectively and each of them of and in the said sum of 10,000*l.* bequeathed as aforesaid by the said will of the said [*testator*], and the stocks, funds, shares, and securities, in or upon which the same may be invested, and the interest, dividends, and annual produce thereof (*e*), To HOLD the said funds, shares, and interests, and all other the premises hereinbefore assigned and released unto the said [Y. Z.] and [X. Z.] and their respective executors, administrators, and assigns, as tenants in common, To THE INTENT that the said sum of 10,000*l.*, and the stocks, funds, and securities in or upon which the same may be invested, and the interest, dividends, and annual income thereof may henceforth, subject to the life interest of the said [W. Z.] therein under the said will of the said [*testator*], be absolutely vested in the said [Y. Z.] and [X. Z.] in equal shares as tenants in common as aforesaid, for their own absolute use and benefit.

IN WITNESS, &c.

(*d*) If a married woman is the recipient, it is not now in any case necessary for her husband to concur in the deed. But where a release is to be given by a woman, who was married, or whose interest "accrued" (as to which see *ante*, Vol. V., p. 72) before 1883, it will be necessary to make her husband a party and to express the release to be made by him as well as the wife.

(*e*) No power of attorney is now necessary, provided notice is given to the executors, see Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25 (6).

XVI. *RELEASE to the* TRUSTEES *of a* WILL *upon* DISTRIBUTION *of the* TRUST PROPERTY *between the testator's two children, a* DAUGHTER'S SHARE *being transferred to the* TRUSTEES *of her* MARRIAGE SETTLEMENT.

THIS INDENTURE (*f*), made the —— day of ——, 18—, BETWEEN [A. B.] (*son of the testator*), of, &c., of the first part; [C. D.] (*husband of testator's daughter*), of, &c., and [E. D.] his wife, of the second part; [G. H.], of, &c., and [J. K.], of, &c. (*trustees of daughter's marriage settlement*), of the third part; and [L. M.], of, &c., and [N. O.], of, &c. (*trustees of the will*), of the fourth part: WHEREAS [*testator*], late of, &c., deceased, duly made and executed his will, dated, &c., and thereby, after bequeathing the specific and pecuniary legacies therein mentioned, he devised all his real estate, including chattels real whatsoever and wheresoever, and bequeathed all his personal estate (except chattels real and what should be otherwise disposed of by his said will or any codicil thereto) unto [L. M.] and [Q. R.], of, &c., upon trust for sale and conversion into money of the same respectively; and upon further trust [*recite trusts for investment, for payment of income to testator's widow for her life or until remarriage, and for the benefit of issue as the widow should appoint, and in default of appointment to testator's children equally, to sons at* 21 *years of age, to daughters on attaining that age or marriage*], And the testator appointed the said [L. M.] and [Q. R.] executors of his will; AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, leaving the said [A. B.] and [E. D.] (then [E. B.]) his only children him surviving, and his will was duly proved by the said [L. M.] and [Q. R.] in the Principal Registry of the Probate Division; AND WHEREAS, after the death of the testator, [L. M.] and [Q. R.] possessed themselves of his real and personal estate, and sold and converted the same, except a leasehold house and grounds thereto belonging situate at ——, in the county of ——, and held for the term of twenty-one years from the —— day of ——, 18—, and out of the monies arising from such sale and con-

Parties.

Recitals: of will;

of death of testator, and probate of will;

sale and conversion of estate;

(*f*) Stamp, 10*s*.

XVI. Release to Trustees of Will on Distribution.

version, and out of the ready money of the testator, paid his funeral and testamentary expenses and debts, and invested the residue, amounting to £——, as to £——, on the security of a mortgage of freehold hereditaments situate at ——, in the county of ——, and as to £——, the residue thereof, in the purchase of £—— 2¾ per centum Consolidated Stock;

death of a trustee and appointment of new trustee;

And whereas the said [Q. R.] died on the —— day of ——, and by an indenture dated, &c., and made between [*parties*], the said [N. O.] was duly appointed in his place to be a trustee of the said will;

breach of trust;

And whereas the lease of the said leasehold premises expired on the —— day of ——, without the same premises having been sold, and it is apprehended that the omission to sell the same was a breach of trust on the part of the trustees of the said will (*g*);

appointment of a share;

And whereas [*testator's widow*], by a deed-poll under her hand and seal, dated the —— day of ——, 18—, in exercise of the power given to her by the said will, appointed that the moiety of the trust funds subject to the trusts of the said will should thenceforth, subject to the life interest therein of the said [*widow*] in the income thereof, be vested in and be held in trust for the said [E. D.] (then E. B.) absolutely;

settlement of appointed share;

And whereas, by an indenture dated, &c., and made, &c. (being a settlement made in consideration of the marriage afterwards solemnized between the said [C. D.] and [E. D.], the said moiety of the trust funds so appointed to the said [E. D.] as aforesaid was assigned by the said [E. D.], with the approbation of the said [C. D.], unto the said [G. H.] and [J. K.], upon the trusts therein contained and declared concerning the same;

death of testator's widow;

And whereas the said [*widow*] died on the —— day of ——, 18—;

state of the trust property;

And whereas the said [L. M.] and [N. O.], at the request of the parties hereto of the first three parts, called in the said mortgage debt or sum of £—— and thereout paid the sum of £—— for succession duty and other expenses incidental to the trust, leaving a balance of £—— cash in their hands;

And whereas all income arising from the trust funds during the life of the said [*widow*] was duly paid to her, and all income arising therefrom has been duly

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(*g*) Where breaches of trust have been committed, they should be particularly stated in the recitals, so that the releasors may not be able to say that they were ignorant of what had occurred. See *ante*, p. 51.

XVI. Release to Trustees of Will on Distribution.

paid to the several persons entitled thereto, as the parties hereto of the first three parts hereby acknowledge; AND WHEREAS the said [L. M.] and [N. O.] have transferred the sum of £—— Consolidated Stock into the names of the said [G. H.] and [J. K.], and have paid to them the sum of £—— cash (being the moieties of the said sums of £—— like annuities and £—— cash respectively), to be held by them upon the trusts of the said indenture of settlement, and have transferred the sum of £—— like annuities into the name of the said [A. B.], and have paid to him the sum of £—— cash (being the residue or other moiety of the said sums of £—— like annuities and £—— cash respectively), (which said transfers and payments in manner aforesaid the said parties hereto of the first three parts do hereby acknowledge respectively): NOW THIS INDENTURE WITNESSETH, that in consideration of the premises, the several parties hereto of the first three parts respectively do, and every of them doth hereby release the said [L. M.] and [N. O.], and each of them, and their and each of their heirs, executors, administrators, estate and effects, and also the estate and effects of the said [Q. R.] deceased, from all actions, proceedings, claims, demands, and accounts whatsoever, for or in respect of the real and personal estate of the said [*testator*], deceased, and the trust funds for the time being representing the same, and the income thereof, and the management, investment, or application of the same respectively, or for any thing done or omitted or permitted to be done by the said [L. M.] and [N. O.], or by [Q. R.] or any of them in or about the administration or exercise of any of the trusts, powers, or provisions of the said will, or for or in respect of any thing in any wise relating to the premises (*h*).

transfers and payments.

Testatum.

Release.

IN WITNESS, &c.

(*h*) If only a partial distribution has been made, the release will be limited to the funds actually paid over and the dealing with them; and the following clause should be added:—

Proviso where the distribution is of part of trust property.

"PROVIDED ALWAYS, that nothing herein contained shall operate to release the said [*executors*] or either of them from the personal estate of the said testator, or the investments representing the same, or the income thereof respectively, other than the said monies and investments so paid and transferred as aforesaid, and the income thereof, or from any actions, accounts, claims, and demands, for or in respect of such other personal estate and income."

XVII. *RELEASE to the* Trustees *of a* Marriage Settlement *upon* Distribution *of the* Settled Funds, *the* Dealings *with the* Funds *being set out in a* Schedule.

Parties.

THIS INDENTURE (*i*), made the —— day of ——, 18—, Between [A. B.] (*son*), of, &c., of the first part; [C. B.], (*son*), of, &c., of the second part; [D. E.] (*married daughter*), the wife of [F. E.], of, &c. (*k*), of the third part; [G. B.] (*daughter*), of, &c., spinster, of the fourth part; the said [A. B.] and [H. I.], of, &c. (*executors of surviving husband*), of the fifth part; and [J. K.], of, &c., and [L. M.], of, &c. (*trustees of settlement*), of the sixth part: Whereas, by an

Recitals: of settlement;

indenture dated, &c., and made between [*parties*] (being the settlement made on the marriage of the said [*husband*] and [*wife*]), it was declared that the said [*original trustees*], or other the trustees or trustee for the time being of the same indenture, should hold the stocks, funds, shares and securities therein mentioned, the particulars whereof are specified in the schedule hereunder written, Upon trust either to allow the same to continue in their then state of investment respectively, or at any time or times with the consent of the said [*husband*] and [*wife*], during their joint lives and of the survivor of them during his or her life, and after the death of the survivor at the discretion of the said trustees or trustee, to sell and convert the same into money; but as to some of the same which were then reversionary or contingent not until they shall respectively fall into possession: And to invest the proceeds of such sale and conversion in or upon any of the stocks, funds, shares, or securities therein mentioned, including amongst others the stocks, funds, shares, and securities, for and into which the proceeds of the said original trust premises have been from time to time varied and invested; And upon further trust to pay the income to the husband for life, with remainder to the wife surviving for life, with remainder to the issue of the marriage as husband and wife or the survivor should appoint; and in

(*i*) Stamp, 10*s*.

(*k*) The husband is not here made a party, as this daughter was married subsequently to the commencement of the Married Women's Property Act, 1882. Her marriage should be recited, stating the date on which it took place.

default for the children at twenty-one or marriage [*setting out hotchpot clause, maintenance and accumulation clauses (if any), and advancement clause*]; And whereas, shortly after the date of the hereinbefore recited indenture of settlement the marriage of the husband and wife was duly solemnized: And whereas there has been issue of the said marriage the said parties hereto of the first four parts respectively, who have respectively attained the age of twenty-one years sometime past, and also one other child, [A. B.], who died in the year 18—, an infant and unmarried: And whereas the said [*original trustee*] died on the —— day ——, 18—, and by an indenture dated, &c., and made between [*parties*], the said [J. K.] was duly appointed to be a trustee of the said indenture of settlement in the place of the said [*original trustee*], deceased: And upon such appointment all the stocks, funds, shares and securities then representing the trust funds, subject to the said indenture of settlement, were duly transferred into and vested in the said [J. K.], jointly with the said [*surviving original trustee*], upon the trusts of the said indenture of settlement; And whereas, on or about the —— day of ——, 18—, the said [J. K.] and [*surviving original trustee*], with the consent in writing of the said [*husband*] and [*wife*], advanced to the said [A. B.] the sum of £——: And whereas the said [*wife*] died on the —— day of ——, 18—: And whereas, on the —— day of ——, 18—, the said [D. E.], formerly [D. B.], intermarried with the said [F. E.]; And whereas, by an indenture dated, &c., and made between [*parties*], the said [L. M.] was duly appointed to be trustee of the said indenture of settlement in the place of the said [*surviving original trustee*], who was desirous of being discharged from the trusts of the same indenture of settlement; And on such appointment the stocks, funds, shares, and securities, then representing the said trust funds, were transferred to and vested in the said [L. M.], jointly with the said [J. K.], upon the trusts of the said indenture of settlement: And whereas the said [*husband*] died on the —— day of ——, 18—, having by his will, dated, &c., and proved, &c., appointed the said [A. B.] and [H. I.] to be the executors thereof; And whereas the schedule hereunder written contains in the first part thereof a full and particular account and statement of the trust funds and property originally comprised in the said indenture of settlement; and, in the second part

of marriage of parents of *cestuis que trust*;

of state of family;

of appointment of J. K. as trustee;

of advance to son;

of death of wife;

of marriage of a daughter;

of appointment of L. M. as trustee;

of death of husband; and probate of will appointing executors;

of statement of particulars of trust pro-

XVII. Release to Trustees of Settlement on Distribution.

thereof, of all sales, variations of investment, and other dealings with the same trust premises, and of all receipts and payments by the trustees or trustee for the time being of the said settlement in respect of the capital of the said trust premises, and since the death of the said [*husband*] of the income thereof; and the said schedule hereunder written contains in the third part thereof the particulars of the monies, stocks, funds, shares, and securities now representing the trust funds and property remaining subject to the said indenture of settlement, and the amounts, shares, and proportions in which the same are now distributable under the trusts of the same settlement; AND WHEREAS the parties hereto of the first four parts respectively have carefully examined the accounts contained in the said schedule hereto, and are satisfied with and approve of the same: AND WHEREAS all income payable to the said [*husband*] during his life, in respect of the said trust premises, has been duly paid or accounted for up to the date of his death (as the said [A. B.] and [H. I.] hereby acknowledge); AND WHEREAS, at the request of the said several parties hereto of the first four parts respectively, the said [J. K.] and [L. M.] have agreed to pay, transfer, and divide the monies, stocks, funds, shares and securities, now representing the trust funds and property remaining subject to the said indenture of settlement in manner mentioned in the second part of the said schedule hereunder written, upon having such release as is hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, They, the said several parties hereto of the first five parts respectively, do, and every of them doth, hereby release the said [J. K.] and [L. M.], and also the said [*original trustees*], and every of them, and their and every of their heirs, executors, administrators, estates and effects, from all actions, proceedings, claims, demands and accounts, whatsoever for or in respect of the trust funds and property comprised in or at any time subject to the trusts of the said indenture of settlement, or for or in respect of any act, matter, or thing mentioned or referred to in the said schedule hereunder written, or for or in respect of anything in anywise relating to the premises.

perty, and accounts, &c., in schedule;

of approval of accounts by *cestuis que trust*;

of payment of income to husband till his death;

of agreement for distribution and release.

Testatum.

Release.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

(*In three parts.*)

XVIII. *RELEASE to a Retiring Trustee of a Settlement (l).*

XVIII. Release to Retiring Trustee.

THIS INDENTURE (*m*), made the —— day of ——, 18—, BETWEEN [A. B.], of, &c., [C. D.], of, &c., and [E. D.], his wife (formerly [E. B.]), and [F. G.] (formerly [F. B.]), widow (being certain of the persons entitled, under an indenture of settlement dated, &c., and made between [*parties*] to the property therein comprised) of the one part, and [*trustee*], of, &c. (who has lately retired from the trusts of the said indenture) of the other part, WITNESSETH that the parties hereto of the first part do and each of them doth hereby release the said [*trustee*] from all claims and demands which may or might be made against the said [*trustee*] by such parties or any of them for, or on account of any act, matter, or thing done, omitted or suffered by the said [*trustee*] in or about the execution of the trusts of the said indenture, and particularly from all actions, proceedings, accounts, claims and demands for or on account of [*describe particular breaches of trust*], and they do hereby jointly and severally covenant with the said [*trustee*] that they or some or one of them, or the executors or administrators of them or some or one of them, will or shall at all times hereafter sufficiently keep indemnified the said [*trustee*] and his estate from and against all actions, proceedings, accounts, claims, and demands which may be instituted or made against the said [*trustee*], his executors or administrators, by any trustee of or person interested under the said indenture of settlement, and not being a party hereto, for or on account of or in anywise in relation to any of the matters hereinbefore mentioned.

Parties.

Testatum.

Release: from all claims on account of the trusts;

and from particular breaches of trust.

Covenant for indemnity.

IN WITNESS, &c.

(*l*) As to the right of a retiring trustee to a release, see *ante*, p. 47.

(*m*) Stamp, 10*s*.

XIX. *RELEASE of a* Right *of* Way, *by* Endorsement *on the Deed of Grant thereof.*

XIX. Release of Right of Way by Endorsement.

THIS INDENTURE (*n*), made the —— day of ——, 18—, Between the within-named [*grantee*], of, &c., of the one part, and the within-named [*grantor*] of, &c., of the other part; WITNESSETH that in consideration of £—— (*n*), now paid by the said [*grantor*] to the said [*grantee*] (the receipt whereof is hereby acknowledged), the said [*grantee*] hereby releases, and as beneficial owner conveys unto the said [*grantor*] and his heirs, All that road or way, or right of way, into, upon, through, or over the said hereditaments and premises within described, granted to him the said [*grantee*] by the within written indenture, [and all other easements (*o*), commodities, rights, claims, and privileges, whatsoever, which he the said [*grantee*] now has in, over, through, upon, or in respect of, the said hereditaments and premises, or any of them], to the intent that the said [*grantor*] and his heirs shall and may, at all times hereafter, hold and enjoy the said hereditaments and premises, with their appurtenances, free from the said right of way, and all other easements, interruptions, claims, and demands whatsoever of or by the said [*grantee*], his heirs or assigns.

Parties.

Testatum.

Release.

In witness, &c. (*p*).

Stamp.

(*n*) The deed will require an *ad valorem* stamp as a conveyance on sale upon the consideration paid for the release: see *post*, sub tit. Stamp Duties, Vol. VII., p. 118.

General words.

(*o*) The effect of these words should be considered, as the releasor may have other easements which he does not intend to relinquish.

(*p*) As to rights of way and other easements, *vide ante*, Vol. V., p. 538, note (*x*).

XX. *RELEASE of a* Right *of* Way *in* Consideration *of a* Grant *of a* New Right *of* Way *over other Lands.*

XX. Release of Right of Way in Consideration of a New Right of Way.

THIS INDENTURE (*q*), made the —— day of ——, 18—, Between [*releasor*], of, &c., of the one part, and [*releasee*], of, &c., of the other part: Whereas by an indenture dated the —— day of ——, 18—, and made between [*parties*], full and free right or liberty was granted to the said [*grantee*], his heirs and assigns, and his and their servants and agents, and the tenants and occupiers for the time being of the messuage and farm of the said [*grantee*], called the —— Farm, to use in manner and for the purposes therein mentioned through, along, and over a road or way therein described and delineated in the map or plan annexed to the same indenture and also delineated in the map or plan hereunto annexed and coloured *red* in such last mentioned map or plan; and by the indenture now in recital, the said [*grantee*] covenanted with the said [*grantor*] to keep the same road or way in repair as therein is mentioned: And whereas [*recite any changes of ownership which have taken place as regards the dominant and servient tenants, so as to show the title of the present releasor and releasee thereto respectively*]: And whereas the said [*releasee*] is erecting a mansion-house with the stables, outhouses and buildings appurtenant thereto, and planting and laying out pleasure grounds in and upon the closes of land described in the hereinbefore recited indenture, and now intersected by the road or way the right or liberty to use which was granted to the said [*grantee*] by the same indenture as aforesaid, and has accordingly requested the said [*releasor*] to release the said right or liberty in manner hereinafter appearing, in consideration of the grant of a new right or liberty of way hereinafter mentioned over other hereditaments of the said [*releasee*] hereinafter described, and the said [*releasor*] being satisfied that such last-mentioned right or liberty of way will be fully as convenient to him and to the tenants and occupiers of the said —— Farm as the right or liberty

Parties.

Recitals:

of grant of right of way;

of agreement for release, and new grant.

(*q*) This deed should be executed in duplicate: the original deed will require a stamp of 10*s.*; the counterpart will require a stamp of 5*s.*

XX. Release of Right of Way in Consideration of Grant of Another Right of Way.

hereby released has agreed to make and execute such release accordingly: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement and in consideration of the grant by the said [*releasee*] hereinafter contained, he the said [*releasor*] hereby releases, and as beneficial owner conveys, unto the said [*releasee*] and his heirs, All that road or way or right or liberty of road or way into, upon, through, or over the said closes of land and hereditaments hereinbefore mentioned or referred to, so as aforesaid granted to the said grantee by the hereinbefore recited indenture, and all other easements, &c. [*see ante*, p. 86], to the intent that the said [*releasee*], his heirs and assigns, shall and may at all times hereafter hold and enjoy the same closes of land and premises with their appurtenances free from the said right or liberty of way, and all other easements, interruptions, claims, and demands whatsoever, of or by the said [*releasor*], his heirs or assigns, or any of the tenants or occupiers of —— Farm aforesaid: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement and in consideration of the premises, he the said [*releasee*] hereby grants, and as beneficial owner conveys, unto the said [*releasor*], his heirs and assigns, FULL and free right and liberty for the said [*releasor*], his heirs and assigns, and his and their servants and agents, and the tenants or occupiers of —— Farm aforesaid, at all times hereafter by night and by day, and for all purposes to go, return, pass, and repass, with or without horses, carts, waggons, and other carriages laden or unladen, and also to drive cattle, sheep, and other animals in, through, along, and over a new road or way recently formed and fenced off by the said [*releasee*], intersecting certain closes or lands in the parish of ——, in the county of —— aforesaid, belonging to him the said [*releasee*] and called the —— close and the —— close respectively and delineated in the map and plan hereunto annexed and therein coloured *green*, and which road or way is of the width of —— feet or thereabouts, and —— yards in length or thereabouts, and runs between the points marked A and B in the said last-mentioned plan, the —— and direction of the same road being therein indicated by dotted *blue* lines: AND the said [*releasor*] hereby covenants with the said [*releasee*] that he the said [*releasee*], his heirs and assigns, will from time to time henceforth at his and their own expense keep repaired and amended in a proper and work-

Testatum.

Release of right of way.

Second *testatum.*

Grant of new right of way.

Covenant to repair road, &c.

XX. Release of Right of Way in Consideration of Grant of Another Right of Way.

manlike manner the road or way, the right or liberty to use which is hereby granted, and also the gates erected by the said [*releasee*] at the extremities thereof, and will repair and renew the quickset hedge or fence lately planted by the said [*releasee*] on both sides of the said road or way: AND THIS INDENTURE ALSO WITNESSETH, that, in consideration of the premises, the said [*releasee*] hereby releases the said [*releasor*] from the covenant on his part hereinbefore recited or referred to for keeping in repair the said road or way, the right or liberty to use which is hereby released, and all other covenants and agreements on the part of the said [*releasor*] contained in the hereinbefore recited indenture of the —— day of ——, 18—; And also from all actions, proceedings, claims, and demands whatsoever for or by reason of the breach, non-observance or non-performance of any such covenants or agreements, or for or by reason of any act, matter or thing in any wise relating to the premises.

Third *testatum.*

Release of covenant for repair of original road.

In witness, &c.

SEPARATION DEEDS.

PRELIMINARY REMARKS.

PAGE

1. NATURE AND EFFECT OF SEPARATION DEEDS.
   - *Validity of Agreements for Separation* 90
   - *Consideration necessary to support Separation Deeds and Agreements* 92
   - *Determination and Avoidance of Separations*..... 98
   - *Effect of Separation Deeds, &c.* 100

PAGE

2. FORM AND CONTENTS OF SEPARATION DEEDS.
   - *Parties* 103
   - *Recitals* 104
   - *Separation Clauses* 105
   - *Property Clauses*..... 107
   - *Clauses as to Custody of Children* 109
   - *Subsidiary Clauses* 112

1. NATURE AND EFFECT OF SEPARATION DEEDS.

Nature and Effect of Separation Deeds.

Agreements for separation formerly void.

Validity of Agreements for Separation.—In early times the Courts of Equity, adopting the maxims of the Ecclesiastical law, regarded all agreements for the separation of husband and wife as contrary to the principles of religion and morality, and accordingly refused to recognize or enforce any such agreements: see *St. John* v. *St. John*, 11 Ves. 526; *Westmeath* v. *Westmeath*, Jac. 126. Moreover, even at Common Law, these agreements were considered as null and void, as a necessary consequence of the old doctrine that "the husband and wife are but one person in the law," so that there were not two parties capable of entering into a contract with each other: Com. Dig. *Baron and Feme* (D. 1); see also Lit. s. 291.

Divorces *a mensâ et thoro.*

Gradually however a change took place in judicial opinion as to the policy of allowing husbands and wives to separate by mutual agreement. In cases of adultery and cruelty, the Ecclesiastical tribunals exercised the power of pronouncing sentences of

Nature and Effect of Separation Deeds.

divorce *a mensâ et thoro*, which were recognized as valid by the Courts of Law and Equity. Such sentences did not dissolve the matrimonial bond; they merely released the parties from their obligation to cohabit, and were at any time liable to be determined by the subsequent reconciliation and cohabitation of the parties: *Lewis* v. *Lee*, 3 B. & C. 291. And it soon came to be considered as desirable in the interests of public policy that, in cases where a divorce *a mensâ et thoro* might have been obtained, the parties should be allowed to effect a similar separation by private agreement. "People began to think that after all it might be better and more beneficial for married people to avoid, in many cases, the expense and scandal of suits of divorce, by settling their differences quietly by the aid of friends out of Court, although the consequence might be that they would live separately, and that was the view carried out by the Courts when it became once decided that separation deeds *per se* were not against public policy:" per *Jessel*, M.R. in *Besant* v. *Wood*, 12 Ch. D. at p. 620; see also *Wilson* v. *Wilson*, 1 H. L. C. 538; *Hunt* v. *Hunt*, 4 De. G. F. & J. 221; *Gandy* v. *Gandy*, 7 P. D. 172. And it is now quite settled that an agreement for separation may be upheld and enforced, although there are no circumstances in the case which would support a decree for divorce or judicial separation: *Sankey* v. *Golding*, Carey 124; *Seeling* v. *Crawley*, 2 Vern. 386; *Head* v. *Head*, 3 Atk. 547; *Fletcher* *Fletcher*, 2 Cox, 99; *Hart* v. *Hart*, 18 Ch. D. 670.

Compromises of suits for divorce permitted.

The objection to the validity of agreements for separation on the ground of the legal unity of the husband and wife was got over by allowing to each of them the right to compromise an action for divorce brought or threatened by the other. "To the general incapacity of husband and wife to sue or be sued by each other, matrimonial suits between them for a divorce *a mensâ et thoro*, for a dissolution, or nullity of marriage, or for restitution of conjugal rights were (of course) exceptions; and some power to terminate such suits by way of compromise would appear, on sound principles, to have been reasonably

Nature and Effect of Separation Deeds.

incident to the power to institute or defend them": per Lord *Selborne*, C. in *Cahill* v. *Cahill*, 8 App. Ca. at p. 429. And now by virtue of the Married Women's Property Act, 1882, a wife is enabled to enter into an agreement for a separation, and for any incidental arrangements as regards property and other matters, which will be enforceable by or against her personally, and will bind all property to which she may be entitled, either by virtue of that statute or otherwise, to her separate use.

Distinction between separation deeds and executory agreements for a separation.

Consideration.]—Agreements for separation are usually made by deed, and there is an important distinction between deeds of separation actually executed, and mere executory agreements for separation not being under seal. Where the instrument is a deed, and has been actually executed, it will, as between the parties themselves and their representatives, be upheld and its trusts will be carried into effect, notwithstanding that it is not founded on any valuable consideration: *Frampton* v. *Frampton*, 4 Beav. 287. It is now settled (after some conflict of judicial opinion) that an executory agreement for a separation not under seal is valid and specifically enforceable, if founded on a valuable consideration: *Wilson* v. *Wilson*, 1 H. L. C. 538; *Vansittart* v. *Vansittart*, 4 K. & J. 62; S. C. 2 De G. & J. 255; but that a valuable consideration is essential to entitle either party to specific performance: *Walrond* v. *Walrond*, John. 18; see *Gibbs* v. *Harding*, L. R. 5 Ch. 336.

Illegal consideration.

An illegal consideration will altogether avoid an agreement for separation, whether under seal or not; as, for instance, if one of the parties undertakes to facilitate proceedings for a divorce: *Hope* v. *Hope*, 8 De G. M. & G. 731; or if a third person pays a sum of money to induce a husband and wife to live apart: *Jones* v. *Waite*, 5 Bing. N. C. 352; but the House of Lords in that case held that the execution of a separation deed by the husband is a good and valuable consideration for a promise by a third person to pay debts of the wife for which the husband is liable: *S. C.* in Dom. Proc. 9 Cl. & F. 101. Where a wife induced the hus-

band to execute a separation deed in contemplation of her renewal of illicit intercourse with a third person, the deed was held void: *Evans* v. *Carrington*, 2 De G. F. & J. 481.

Nature and Effect of Separation Deeds.

A merely voluntary separation deed not importing a valuable consideration, is within the mischief of the stats. 13 Eliz. c. 5. and 27 Eliz. c. 4 (see sub tit. "SETTLEMENTS," *post*, pp. 164 *et seq.*), and though binding on the parties themselves (*supra*) and their representatives, cannot be enforced as against creditors: *Fitzer* v. *Fitzer*, 2 Atk. 511; *Clough* v. *Lambert*, 10 Sim. 174; nor against subsequent incumbrancers or purchasers for value: *Cowx* v. *Foster*, 1 J. & H. 30.

Consideration necessary to support separation deed against creditors.

The consideration usually relied on in practice to support separation deeds as against creditors is supplied by a covenant by the trustees to indemnify the husband against the wife's debts (*a*). And such a consideration is effectual for this purpose: *Stephens* v. *Olive*, 2 Br. C. C. 90; *Worrall* v. *Jacob*, 3 Mer. 256; *Logan* v. *Birkett*, 1 My. & K. 220. The following have also been held to be sufficient valuable considerations:—a covenant to indemnify the husband against his own debts: *Wilson* v. *Wilson*, 1 H. L. C. 542; *Waite* v. *Jones*, 9 Cl. & F. 101; a covenant by the trustees to maintain a child of the marriage: *Nixon* v. *Hamilton*, 1 Ir. Eq. R. 56; by a wife of her claim to alimony: *Hobbs* v. *Hall*, 1 Cox, 445; a release of dower or jointure: *Jee* v. *Thurlow*, 2 B. & C. 553; *Hewison* v. *Negus*, 16 Beav. at p. 598; a release by the wife of money owing to her by the husband: *Nixon* v. *Hamilton*, 1 Ir. Eq. R. 56; the acceptance by a wife of a provision for her maintenance in lieu of bringing an action for divorce: *Hobbs* v. *Hall*, 1 Cox, 445; *Nunn* v. *Wilsmore*, 8 T. R. 521; the compromise of

What are sufficient considerations.

(*a*) This covenant was formerly regarded as essential to the validity of a separation deed: see *St. John* v. *St. John*, 11 Ves. 532; but this doctrine has long since become obsolete: see *Frampton* v. *Frampton*, 4 Beav. 287; *Wilson* v. *Wilson*, 7 H. L. C. 542; and the cases cited in the text.

As to the liability of a husband for his wife's debts during separation, see *post*, p. 101.

Nature and Effect of Separation Deeds.

an action for divorce: see *Wilson* v. *Wilson*, 1 H. L. C. 538; *Jodrell* v. *Jodrell*, 9 Beav. 545; *Hart* v. *Hart*, 18 Ch. D. 670 (*b*). And a stipulation in an agreement for a separation deed that the expenses of the agreement and deed should be borne equally by the husband and the trustees: *Gibbs* v. *Harding*, L. R. 5 Ch. 336. So also a release by the husband of his marital claims to after acquired property of the wife, is a sufficient consideration for a covenant not to sue for restitution of conjugal rights: *Logan* v. *Birkett*, 1 My. & K. 220; *Marshall* v. *Marshall*, 5 P. D. 19. But the last mentioned consideration cannot be imported into separation deeds executed in cases coming within sects. 2 or 5 of the Married Women's Property Act, 1882 (45 & 46Vict. c. 72). A release of the husband's claim to curtesy, or to the wife's personalty on intestacy, would however apparently be a valid consideration.

Consideration may be shown *aliunde*.

In order to support an agreement for separation, it is not essential that the consideration should appear on the face of the instrument, the fact that there was a valuable consideration may be proved *aliunde*: *Hobbs* v. *Hall*, 1 Cox, 445; see *Llanelly Rail. and Dock Co.* v. *London and North Western Rail. Co.*, L. R. 8 Ch. 942. In the absence of evidence to the contrary, the legal presumption is in favour of the validity of a separation deed: *Jones* v. *Waite*, 9 Cl. & F. 101. Provided there be in fact a valuable consideration, the Court will not entertain any question as to its adequacy in point of amount or extent. The consideration should, however, always be expressly stated in the instrument so as to avoid the possibility of future question.

Instrument containing illegal provisions.

Where a separation deed has been actually executed which contains illegal covenants or provisions not forming the consideration for, nor being of the

(*b*) The point has never been decided whether such a compromise is a sufficient consideration to support a *separation deed* as against creditors, but in the cases cited above this consideration has been held to be sufficient to render an *agreement not under seal* binding as between the parties, and the rule is that a sufficient valuable consideration is necessary to support such an agreement even as between the parties: see *ante*, p. 92.

Nature and Effect of Separation Deeds.

essence of the deed, the Court will enforce such of the covenants and provisions as are legal and proper, rejecting the others: *Swift* v. *Swift*, 4 De G. J. & S. 710; *Hamilton* v. *Hector*, L. R. 13 Eq. 511. But a mere executory agreement not under seal must be enforced *in toto* or not at all, and therefore, if it contains any illegal covenants or provisions, it must be rejected altogether: see *Guth* v. *Guth*, 3 Br. C. C. at p. 620; see also *Vansittart* v. *Vansittart*, 3 De G. & J. 249; *Walrond* v. *Walrond*, Johns. 18.

Illegal stipulations.

Where a man went through the ceremony of marriage with his deceased wife's sister, and on their subsequent separation a deed was executed containing a provision that if the parties should by mutual consent live together again, the deed should be void, it was held that, as the parties could never legally live together as man and wife, this provision was void, and that the condition being a condition subsequent, the deed must be read as if the provision were omitted: *Ex parte Naden*, L. R. 9 Ch. 670.

Testamentary gifts favouring separation.

Testamentary gifts favouring separation are regarded as contrary to public policy. So, where a will contained a bequest to a married woman separated from her husband with a condition defeating the bequest in case the parties should resume cohabitation, the condition was rejected, and the bequest was held absolute: *Wren* v. *Bradley*, 2 De G. and S. 49; see *Brown* v. *Peck*, 1 Ed. 140. But a devise of realty would be altogether avoided by such a condition: *Benn* v. *Griffiths*, 1 Jur. (N. S.) 1045; and a gift over of realty depending on the condition, whether to the husband or to a stranger, would also be void: see *H.* v. *W.*, 3 K. & J. 382; *Westmeath* v. *Westmeath*, 1 Dow. & Cl. 519. In *Shewell* v. *Dwarris*, Johns. 172, a provision in a will for the contingency of the legatee living apart from her husband was held to show an intention that she should take absolutely for her separate use.

Separation deed or agreement void unless separation exists or begins at once.

An agreement for separation, whether under seal or otherwise, will be altogether void, unless actual separation exists at the time of the execution of the instrument, or follows immediately thereupon. The leading authority for this position is the case of

Nature and Effect of Separation Deeds.

Durant v. *Titley*, 7 Pri. 577, where an action of covenant was brought by the wife's trustee against the husband to recover arrears of an annuity under a separation deed, which recited existing differences, and bound the husband to pay the annuity in case she should live apart from her husband and take one of her children to live with her; the husband and wife were living together at the time of the execution of the deed, but a separation took place some years afterwards; it was objected that the deed being executed in contemplation of a future separation, was void; upon which ground (as it would seem) the Court of Exchequer Chamber, consisting of *Abbott*, C.J., and *Dallas*, J., reversing a judgment of the Court of Exchequer, held that the action could not be maintained: *Hindley* v. *Westmeath*, 6 B. & C. 200; *Westmeath* v. *Westmeath*, 1 Dow. & Cl. 519; *S. C.*, sub nom. *Westmeath* v. *Salisbury*, 5 Bli. (N. S.), 339; *Webster* v. *Webster*, 4 De G. M. & G. 437; *Bindley* v. *Mulloney*, L. R. 7 Eq. 343. And it seems that a mere continuance of residence under the same roof without cohabitation will prevent the instrument from taking effect: see *Westmeath* v. *Salisbury*, 5 Bli. (N. S.), at p. 395.

Provisoes for prospective separation (*c*).

If a marriage settlement provides for the contingency of a future separation, such provision will be void as against public policy: *H.* v. *W.*, 3 K. & J. 382; *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982; and in *Bond* v. *Taylor*, 2 J. & H. 473, a provision of this nature was ordered to be struck out. But such a provision, if contained in a separation deed, will altogether vitiate the instrument: *Jones* v. *Waite*, 9 Cl. & F. 101; *Procter* v. *Robinson*, 14 W. R. 381.

(*c*) The remarks in the text are confined in their application to separations arising from differences between married persons. There does not seem to be any objection on grounds of public policy or otherwise to the insertion in a marriage settlement of a clause providing for the contingency of separation arising from the nature of the husband's profession or employment, or any other cause not involving any breach of the mutual obligations of the husband and wife: see *Cartwright* v. *Cartwright*, 10 Ha. at p. 633. Such clauses are, however, rarely met with in practice.

Nature and Effect of Separation Deeds.

Provisoes contemplating reconciliation and renewed separation.

The question as to the validity of a provision contained in a separation deed for the contingency of a renewed separation after a reconciliation, is not free from doubt. The validity of a proviso for a conditional separation, to take place with the consent of third parties, was affirmed by the Court of King's Bench in the cases of *Lord Rodney* v. *Chambers,* 2 East, 283, and *Chambers* v. *Caulfield,* 6 East, 244. These decisions are regarded by Mr. Roper (see Rop. H. & W. 289) as overruled by the later decision of the Court of Exchequer Chamber in *Durant* v. *Titley,* 7 Pri. 577; see also *Westmeath* v. *Westmeath,* 1 Dow. & Cl. 519. But in *Durant* v. *Titley* (see *ante,* p. 96), the husband and wife were apparently living together at the date of the separation deed, so that the grounds for the decision not being reported, it would seem that this case fell under the general rule that deeds contemplating a future separation of a husband and wife are void. And in *Jee* v. *Thurlow,* 2 B. & C. at p. 551, *Abbot,* C.J., expressly stated that the judges who decided the case of *Titley* v. *Durant* (of whom his Lordship was one) did not intend to shake any former decision. Where a husband and wife who had separated and were actually living apart, entered into an agreement providing for their living together again, but containing stipulations providing for the contingency of a renewed separation, Lord *Cottenham,* C., after reviewing the decisions bearing upon the illegality of agreements for a prospective separation, expressed his doubt whether under the circumstances of that case, the stipulations might not be upheld, but it was not necessary to decide the point: *Vandergucht* v. *De Blaquiere,* 5 My. & C. at pp. 243, 244; see also *Nichols* v. *Danvers,* 2 Vern. 671; *Soilleux* v. *Herbst,* 2 B. & P. 444; *Bateman* v. *Ross,* 1 Dow. 235; *Cartwright* v. *Cartwright,* 3 De G. M. & G. 991; *Jodrell* v. *Jodrell,* 9 Beav. 45. The validity of deeds containing such provisions as are now under consideration, however, seem questionable. Sir S. *Romilly's* argument in *Lord St. John* v. *Lady St. John,* 11 Ves. 538, places the principle of this doctrine in a very clear light: he observed

Nature and Effect of Separation Deeds.

that, even admitting that the wife was to be treated as a *feme sole*, a provision for future separation could not be valid, for it would not be valid if contained in a settlement made previous to marriage when she was actually sole; and Lord *Eldon* admitted the force of this argument. On the whole it would seem that such a provision, though perhaps it might not vitiate a separation deed, would be void, or at all events would have no effectual operation, as it would apparently determine, together with the other "separation clauses," upon a reconciliation and resumption of cohabitation: see *infra*.

Covenant not to visit wife without consent of trustees.

A separation deed containing a covenant by a husband not to visit his wife except with the consent of the trustees of a separation deed, has been held not to be void as contrary to public policy: *Webster* v. *Webster*, 4 De G. M. & G. 437.

Probability of reconciliation.

The Court will not now inquire as to the probability of a reconciliation, before enforcing an executory agreement for a separation: *Fletcher* v. *Fletcher*, 2 Cox, 99.

Separation determined by complete reconciliation.

Determination and Avoidance of Separations.]—A reconciliation and return to cohabitation will *ipso facto*, without any stipulation to that effect, determine a separation by arrangement: *Westmeath* v. *Westmeath*, 1 Dow. & Cl. 519; *Ruffles* v. *Alston*, L. R. 19 Eq. 539; *Besant* v. *Wood*, L. R. 12 Ch. D. 613. But mere reconciliation without cohabitation will not have that effect: *Frampton* v. *Frampton*, 4 ~~B. & C.~~ 287; nor will a resumption of residence under the same roof be sufficient to determine the separation, if the parties are not reconciled, but continue in a state of hostility: *Bateman* v. *Ross*, 1 Dow. 245.

Trusts of property may continue notwithstanding determination of separation.

But a separation deed may be intended not only to prescribe the conditions under which the parties are to live separate, but also to effect a settlement of property. "The distinction is plain between a deed which has for its one and only object separation, and the stipulations in which are for separation alone; and a deed which has separation for one of its objects, but has many others": *per* Lord *Cole-*

Nature and Effect of Separation Deeds.

ridge, C.J., in *Negus* v. *Foster*, 46 L. T. at p. 676. Although, therefore, a complete reconciliation will put an end to the operation of a separation deed, so far as the "separation clauses" are concerned, this is not necessarily the case as regards the "property clauses," if any, contained in the deed. There is no illegality in the insertion in a separation deed of express provisions effecting a permanent settlement of property, and declaring that the trusts thereof shall continue notwithstanding a determination of the separation: *Wilson* v. *Mushett*, 3 B. & Ad. 743; *Crouch* v. *Waller*, 4 De G. & J. 302. And even in the absence of any express stipulation to that effect, a continued effect will be given to the trusts and provisions of the deed relating to property, if, under the circumstances of the case, such appears to have been the intention of the parties: see *Gawden* v. *Draper*, 2 Vent. 217; *Randle* v. *Gould*, 8 E. & B. 457; *Ruffles* v. *Alston*, L. R. 19 Eq. 539; but see *Nicol* v. *Nicol*, 31 Ch. D. 524.

Where, upon a separation, a deed was executed making a provision for all the children of the marriage who should attain twenty-one years of age, and a reconciliation having taken place, another child was born; it was held that, upon the construction of the deed, a permanent settlement of property was intended to be effectual, the child born after the determination of the separation was not entitled to participate in the provision: *Hulme* v. *Chitty*, 9 Beav. 437.

Avoidance of separation deed for fraud, undue influence ~~or~~ & adultery.

A separation deed will be liable to be set aside, if its execution has been obtained by fraud: *Evans* v. *Edmonds*, 13 C. B. 777; or by duress or undue influence: *Lambert* v. *Lambert*, Br. P. C. 18; *Crabb* v. *Crabb*, 37 L. J. P. & M. 42; or for the purpose and in contemplation of a renewal of illicit intercourse: *Evans* v. *Carrington*, 2 De G. F. & J. 481; or as it would seem, if the deed has been executed by one of the parties without proper advice and under a mistake as to material facts: *Procter* v. *Robinson*, 14 W. R. 381. So, a husband will not be bound by a separation deed executed by him in ignorance of prior acts of adultery on the part of

Nature and Effect of Separation Deeds.

the wife: *Brown* v. *Brown*, L. R. 7 Eq. 185; see also *Evans* v. *Edmonds*, and *Evans* v. *Carrington*, *supra*.

Avoidance for breach of covenant.

An application by one party for custody of the children is not such a breach of a covenant to allow the other party to have such custody, as to cause the deed to be set aside, as all arrangements as to custody of children are subject to the approval of the Court (see *post*, p. 110): *Besant* v. *Wood*, 12 Ch. D. 605. Nor will the breach by a wife of a covenant by the trustees on her behalf to maintain the children relieve the husband from his liability under a covenant to pay to her a stipulated annuity; his only remedy is against the trustees.

Effect of avoidance of agreement for separation.

Where an agreement for separation, whether under seal or not, is avoided, on account of its not being followed by an immediate separation, it leaves the parties in the same position as if it had never been executed. If, therefore, the husband subsequently deserts the wife, she will be entitled to be supported by him, and, on his default, she may pledge his credit for necessaries: *Cock* v. *Cock*, 13 W. R. 189; if, on the other hand, the wife, subsequently to execution of the void agreement, leaves the husband without his consent, she will have no power of pledging his credit, notwithstanding the execution of the instrument: *Hindley* v. *Westmeath*, 6 B. & C. 200.

Protection afforded by agreement for separation.

Effect of Separation Deeds, &c.]—A valid agreement for separation is a good defence to an attempt by the husband to obtain possession of the wife by *habeas corpus*: *R.* v. *Mead*, 1 Burr. 542; *R.* v. *Winton*, 5 T. R. 91. Such an agreement will support an injunction to restrain one of the parties from molesting the other contrary to the covenants therein contained: *Sanders* v. *Rodway*, 16 Beav. 207; it would formerly have been a good ground for an injunction, to restrain a breach of covenant not to sue for restitution of conjugal rights, and is now pleadable as an equitable defence to such an action: see *Stanes* v. *Stanes*, 3 P. D. 42; *Marshall* v. *Marshall*, 5 P. D. 19; *Gandy* v. *Gandy*,

7 P. D. 79; see also Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 24 (2).

Nature and Effect of Separation Deeds.

A separation by private arrangement does not dissolve or suspend the matrimonial relation of the parties, but merely relieves them from their obligation to cohabit: *Marshall* v. *Rutton*, 8 T. R. 545; see *St. John* v. *St. John*, 11 Ves. at p. 530; consequently, a separation deed has been held to be no bar to an action for damages in respect of the seduction of the wife: *Chambers* v. *Caulfield*, 6 East, 244; nor does it constitute a license to either party to commit adultery; and therefore acts of adultery subsequent to the execution of a deed of separation, or prior thereto, but subsequently discovered, and not in contemplation of the parties at the time when the instrument was executed, will entitle the aggrieved party to institute proceedings for judicial separation or divorce, notwithstanding the agreement: see *Evans* v. *Carrington*, 2 De G. F. & J. 481; *Brown* v. *Brown*, L. R. 7 Eq. 185; *Powell* v. *Powell*, L. R. 3 P. & D. 55; *Morrell* v. *Morrell*, 6 P. D. 98. And a separation deed will not, in the absence of express stipulation to the contrary, deprive the wife of her right to dower or freebench, nor of her right to a share of her husband's personal estate under the Statute of Distributions: *Slatter* v. *Slatter*, 1 Y. & C. Ex. 28; nor will it affect the marital rights of the husband over the wife's personalty, not being her separate property, either by statute or otherwise, nor, it is conceived, his curtesy out of her real estate: see *Molony* v. *Kennedy*, 10 Sim. 254.

Effect of separation on relation of parties

It has been repeatedly held that, notwithstanding a separation, the husband would continue liable to his wife's debts in respect of necessaries, unless she were sufficiently provided with them, or with the means of acquiring them, either out of her separate property, or by reason of the husband having made to her an adequate allowance for her maintenance; but that the regular payment of such an allowance would be a good defence to an action against the husband for goods supplied to the wife: *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Hindley* v. *Westmeath*, 6 B. & C. 200; *Migan* v. *Peek*, 3 M. & W. 481; *Clif-*

Liability of husband to wife's debts during separation.

Nature and Effect of Separation Deeds.

ford v. *Laton*, Moo. & M. 101; *Dennys* v. *Sargeant*, 6 C. & P. 419; *Emmett* v. *Norton*, 8 C. & P. 506; *Eastland* v. *Burchell*, 3 Q. B. D. at p. 436; *Wilson* v. *Glossop*, 20 Q. B. D. 354. And where a wife has been deserted, or turned away by her husband, the rule now is that the adequacy of the consideration, having regard to his means and position, is a question for the jury: *Baker* v. *Simpson*, 14 C. B. (N. S.) 383; *Bazeley* v. *Forder*, L. R. 3 Q. B. 562; *Eastland* v. *Burchell*, 3 Q. B. D. 432. But where the parties are separated by mutual arrangement, it seems to be now settled, after some diversity of opinion (see *Lidler* v. *Wilmot*, 2 St. N. R. 86; *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Dixon* v. *Hurrell*, 8 C. & P. 717; *Johnston* v. *Sumner*, 3 H. & N. 267), that the parties may make what terms they please, and that the arrangement having been completed, the wife has no longer any authority to pledge the husband's credit, even though the maintenance be not ample according to the husband's rank and condition in life. The law on the subject is thus laid down by *Lush*, J., in *Eastland* v. *Burchell*, 3 Q. B. D. at pp. 435, 436: "The authority of a wife to pledge the credit of her husband is a delegated not an inherent authority. If she binds him she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense (*d*). But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they

(*d*) See further on this point, *Manby* v. *Scott*, 1 Lev. 4, and the notes to that case in 2 Sm. L. C. 481.

Nature and Effect of Separation Deeds.

continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property, or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions on which that consent was given. And it seems superfluous to add, that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife would have claimed, that is the stipulated allowance. He can derive no authority from the wife, which she is incompetent to give." If a wife is induced by improper influence to agree to an inadequate provision for her maintenance the Court will relieve her: *Lambert* v. *Lambert*, 2 Br. P. C. 18.

2. Form and Contents of Separation Deeds.

Who should be made parties.

Parties.]—The parties to a separation deed are usually the husband of the first part, the wife of the second part, and one or more trustees of the third part. Where any property is to be held under trusts declared in the deed, it is of course necessary that trustees should be made parties, but otherwise it seems clear that a deed made between the husband and wife alone, without the intervention of trustees would be valid and effectual, inasmuch as a husband and wife are now competent to covenant with and convey property to each other, and a married woman can hold and dispose of property without the intervention of

Form, &c., of Separation Deeds.

a trustee: see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sects. 1, 5; and the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 50. It is, however, generally advisable that trustees should be made parties to separation deeds, both in order to avoid the inconvenience likely to arise from direct communication between the parties during the separation with regard to matters arising out of the deed, and also in order that the trustees may covenant for indemnity against the wife's debts, which, as has been seen (*ante*, p. 93), would be a good consideration for the deed, should other considerations fail.

As to inserting recitals.

Recitals.]—Recitals may, if it be thought advisable, be inserted in a separation deed, explaining the circumstances which have led to the agreement to separate, *e.g.*, the institution and compromise of proceedings for a divorce or judicial separation, which would supply a consideration sufficient to support the deed (see *ante*, p. 93), and the nature of and title to any property intended to be comprised in the trusts and provisions of the deed; and, where the instrument contains stipulations as to the custody of the children, it will be convenient to recite the state of the family. Even where no such narrative recitals are introduced, it is very usual to insert an introductory recital of the agreement to separate by reason of "unhappy differences" having arisen between the husband and wife; the insertion of such a recital was formerly deemed important, as sufficiently indicating circumstances which might have warranted a divorce *a mensâ et thoro* (see *Clough* v. *Lambert*, 10 Sim. 174), but an agreement for separation is now enforceable independently of any such circumstances: see *ante*, p. 91. A recital of an agreement to live separate contained in a separation deed to which the wife was a party, was held to be evidence of a contract by her not to sue for restitution of conjugal rights: *Clark* v. *Clark*, 10 P. D. 188.

Operative part.

The operative part of the deed should state expressly the consideration on which the transaction

Form, &c., of Separation Deeds.

is to be founded (as to which, see *ante*, p. 93), and should declare that the parties covenant and agree to observe and perform the stipulations and provisions contained in the deed, and on their parts respectively to be observed and performed. Where trustees are added, the covenants by the husband and wife should be made not only with each other, but also with the trustees.

Arrangement of clauses.

The stipulations and provisions (which may often be conveniently embodied in numbered clauses or articles) may conveniently be arranged under four groups, viz., (1) the separation clauses, (2) the property clauses, (3) the clauses relating to custody of children, and (4) the subsidiary clauses.

The Separation Clauses.]—The separation clauses usually include covenants that the husband and wife shall live apart from each other, that they shall not molest each other nor take any proceedings for restitution of conjugal rights, and sometimes that neither of them shall take proceedings for a divorce or judicial separation in respect of any misconduct which has, or is alleged to have taken place.

Covenant that parties shall live apart.

It has been seen (*ante*, p. 91) that the Court will enforce a covenant by a husband that his wife may live apart from him. In the case of *Hart* v. *Hart*, 18 Ch. D. 670, the husband was compelled to execute a deed containing such a covenant pursuant to the stipulations of an executory agreement, although the wife had by her misconduct forfeited her right to an annuity thereby stipulated to be paid. This covenant impliedly imposes on the parties the obligation not to molest each other or take proceedings for restitution of conjugal rights, and may be pleaded as a defence to any such proceedings: *ante*, p. 100; see *Marshall* v. *Marshall*, 5 P. D. 19.

Covenant against molestation.

An express covenant against molestation is, however, usually inserted. It has been held that the subsequent adultery of the wife, even though resulting in the birth of a spurious child, is no breach of her covenant not to molest her husband; but apparently the covenant would be broken if she

Form, &c., of Separation Deeds.

were to allege her husband to be the father of the child, especially if such allegation were made with the view to claim a title or property to which a legitimate child of the husband would be entitled: see *Fearon* v. *Earl of Aylesford*, 14 Q. B. D. 792. Institution of proceedings for a judicial separation or divorce are no breach of a covenant against molestation (see *Thomas* v. *Everard*, 6 H. & N. 448; *Williams* v. *Baily*, L. R. 2 Eq. 731; *Flower* v. *Flower*, 20 W. R. 231), and, accordingly, where it is desired to preclude a party from taking such proceedings, an express provision to that effect should be inserted in the deed.

In *Hunt* v. *Hunt*, 4 De G. F. & J. 221, it was held by Lord *Westbury*, C. (reversing the decision of *Romilly*, M.R.) that a covenant by a husband that his wife might live apart from him, and that he would not compel her to cohabit with him by any legal proceedings, was enforceable by injunction (*e*) against proceedings in the Divorce Court for the restitution of conjugal rights. See, however, the remarks of Lord *Selborne*, C., on this case in *Cahill* v. *Cahill*, 8 App. Ca. 420. Where a wife's suit for dissolution of the marriage was compromised under an agreement to execute a separation deed, and he specially undertaking not to institute other proceedings in the Divorce Court, it was held that the stipulation precluded her from instituting any proceedings in respect of anything up to the date of the compromise, notwithstanding alleged subsequent misconduct of the husband, but that it did not amount to an undertaking never to institute any proceedings founded only on such subsequent misconduct: *Rowley* v. *Rowley*, L. R. H. L. Sc. & D. App. 63.

Stipulation as to condonation of past offences.

A condonation of past offences is not implied by an agreement that the parties shall live apart: *Moore* v. *Moore*, 12 P. D. 193. If a separation deed is intended to have this effect, an express condonation

(*e*) A pending action cannot now be restrained by injunction, but a stay of proceedings may be ordered: see the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 24 (5).

Form, &c., of Separation Deeds.

clause and covenant not to sue in respect of any cause of complaint which may have arisen previously to the execution of the deed should be inserted therein. Such a stipulation is binding, and will not be deprived of its force by subsequent adultery; so where a husband and wife had separated under a deed containing a condonation clause, and covenant not to sue in respect of past offences, it was held by the Court of Appeal (affirming the decision of *Hannen*, J., reported 7 P. D. 225) that subsequent adultery of the husband did not revive the right of the wife to complain of cruelty which had been committed before the deed, so as to enable her to obtain a decree for dissolution of the marriage: *Rose* v. *Rose*, 8 P. D. 98. See also *Gandy* v. *Gandy*, 7 P. D. 168; *Collins* v. *Collins*, 9 App. Ca. 205.

The Property Clauses.]—Next in order may follow the clauses (if any) relating to property, such as a covenant for securing an annuity for the wife, or, in some cases, for the husband; the settlement of a gross sum for the benefit of the parties during their respective lives; a covenant by the husband for the wife's enjoyment of property for her separate use; and provisions for the devolution of the wife's property in case of her intestacy, and for her disposition thereof by will.

Provision of annuity for wife's maintenance.

Where the wife is not possessed of any separate property, the deed will usually contain a covenant by the husband with the trustees to pay to them quarterly or half-yearly a stipulated sum by way of annuity for her maintenance. It has been seen that such a covenant will take from the wife all authority to pledge her husband's credit, even though the annuity should prove insufficient for her maintenance: see *ante*, p. 102.

Dum casta clause.

Sometimes a clause is added to this covenant, providing that the annuity shall cease in case of the wife's unchastity. It has been held that the insertion of this clause in a separation deed cannot be insisted on where an executory agreement for a separation provides that the deed to be executed pursuant thereto is to contain the provisions *usually*

Form, &c., of Separation Deeds.

inserted in separation deeds: *Hart* v. *Hart*, 18 Ch. D. 670. In the absence of such a clause, the husband will be bound to continue the annuity notwithstanding the wife's subsequent adultery: *Evans* v. *Carrington*, 2 De G. F. & J. 481; *Fearon* v. *Earl of Aylesford*, 14 Q. B. D. 792; and even after the marriage has been dissolved on that ground: *Charlesworth* v. *Holt*, L. R. 9 Ex. 38. But the Court has power to treat the property clauses of a separation deed as a post nuptial settlement, and to vary them accordingly under the stats. 22 & 23 Vict. c. 61, sect. 5, and 41 Vict. c. 19, sect. 3. But this power arises only where a decree for dissolution of the marriage has been pronounced, and not in the case of a judicial separation: *Worsley* v. *Worsley*, L. R. 1 P. & D. 648; *Benyon* v. *Benyon*, 1 P. D. 447; *Gandy* v. *Gandy*, 7 P. D. 168; *Clifford* v. *Clifford*, 9 P. D. 76.

Annuity not forfeited by breach of wife's covenants.

If the covenant for payment of an annuity is unconditional, the right of the wife thereto is not forfeited by breach of covenant on her part: *Crouch* v. *Waller*, 4 De G. & J. 302; see *Fearon* v. *Lord Aylesford*, 14 Q. B. D. 792. Attention should be given to this point in framing such covenants.

Proviso that trusts of annuity, &c., shall continue notwithstanding renewal of cohabitation.

Although it is the general rule that even a temporary reconciliation and resumption of cohabitation will absolutely put an end to a separation, yet there is nothing to prevent the Court from giving effect to a clause providing that the trusts and covenants contained in a separation deed relating to the payment of an annuity to the wife shall continue, notwithstanding that the parties should afterwards agree to live together: *Wilson* v. *Muskett*, 3 B. & C. 743; see also *Ex parte Noden*, L. R. 9 Ch. 670.

So also a separation deed may contain trusts and provisions with regard to property, so as in effect to create a post nuptial settlement for the benefit of the husband and wife successively for their respective heirs, with remainders for the benefit of their children or other persons, and such trusts will continue in force notwithstanding the determination of the separation, if the deed so provides: see *ante*, p. 98.

Form, &c., of Separation Deeds.

The provision of an annuity for the maintenance of the wife does not, unless the separation deed expressly provides otherwise, affect her right to a share in the husband's personalty under the Statute of Distributions: *Slatter* v. *Slatter*, 1 Y. & C. Ex. 28.

Wife's rights under Statute of Distributions.

Whether husband's offer to resume cohabitation determines wife's right to maintenance.

Whether the husband's proposal to receive his wife to live with him again determines a separate maintenance agreed between them on the occasion of a separation, depends on the terms of the agreement. If the annuity is to be paid so long only as they shall mutually agree to live apart, then it is obvious that the husband's offer to renew the cohabitation puts an end to the state of facts on which the continuance of the annuity depends: see *Head* v. *Head*, 3 Atk. 295. If, on the other hand, the provision is to continue until the parties mutually agree to live together, the concurring act of the wife is necessary to determine the annuity; and the mere offer of the husband to receive and maintain her will not affect her claim: see *Guth* v. *Guth*, 3 Br. C. C. 614. Explicitness on this point, therefore, should be an object of attention in preparing separation deeds.

Provision of annuity for husband.

Sometimes, where the wife is possessed of considerable property, an annuity is granted by her to the husband. A release by the husband of his marital rights in respect of future property to be acquired by the wife is a good consideration for such a grant, and the Court will accordingly enforce payment of the annuity: *Logan* v. *Birkett*, 1 My. & K. 220.

Custody of children.

Clauses as to Custody of Children.]—The rights, as regards custody of children, of husbands and wives during coverture, and of the survivors, have been already discussed in treating of the adoption of children by strangers, *ante*, sub tit. "APPOINTMENTS," Vol. I. p. 525, n. (*o*).

Validity of covenants as to custody.

Formerly it was considered that a stipulation in a separation deed that the mother should have the custody of the children to the exclusion of the father was void, unless such misconduct on the

Form, &c., of Separation Deeds.

husband's part was proved as contrary to public policy, as to disentitle him from exercising his parental rights: *Hamilton* v. *Hector,* L. R. 13 Eq. 511; and the insertion of such a clause in an executory agreement would have wholly invalidated the instrument: *Vansittart* v. *Vansittart,* 2 De G. & J. 249; see also *St. John* v. *St. John,* 11 Ves. at p. 530; *Hope* v. *Hope,* 8 De G. M. & G. 731.

But now by the Act to Amend the Law as to the Custody of Infants, 1873 (36 Vict. c. 12), sect. 2, it is enacted that,

> "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

This section in its terms applies only to separation deeds, but it seems clear that the insertion of such a stipulation in an executory agreement not under seal would not vitiate the instrument; but would, on the contrary, entitle the mother to require the husband to execute a proper deed containing a stipulation to the same effect: see *Hart* v. *Hart,* 18 Ch. D. at p. 682; see also Fry on Specific Performance, p. 651.

It would seem that a provision in an agreement for a separation that the husband shall make an allowance to the wife, she "to maintain the child or children," would be construed as agreeing to give her the custody of the child or children: *Hart* v. *Hart, supra;* but not so if the provision is that the deed shall continue "all usual terms as to access to children": *Evershed* v. *Evershed,* 36 L. T. 690; 30 W. R. 732.

It is therefore quite clear that at the present time a covenant by the husband to allow the wife to have the custody of the children is valid, and may be enforced: *Re Besant,* 11 Ch. D. 508; *Hart* v. *Hart,* 18 Ch. D. 670.

Provisions as to custody should be explicit.

It is of great importance, where there are infant children of a husband and wife who are about to

Form, &c., of Separation Deeds.

separate, that the separation deed should contain express and definite provisions regulating the rights of the parties as regards the custody of the children, and the duration of such rights, and the limitations as regards access, subject to which such rights are to be exercised; the deed should also, if necessary, provide for the maintenance of the children and their education, specifying the schools to which they are to be sent, and the persons with whom the holidays are to be spent.

Annuity for maintenance of children enforceable.

Even before the recent Act it was held that an agreement by a husband to secure an annuity, for the maintenance of his separated wife and her child, could be specifically enforced: *Gibbs* v. *Harding*, L. R. 5 Ch. 336; so also, an agreement by the husband that the children should remain at particular schools, and should spend the holidays at such places as the trustees should direct: *Hamilton* v. *Hector*, L. R. 6 Ch. 701.

Removal of children out of England.

Where a separation deed gave the custody of the children to the husband, but he covenanted that full and free liberty of access should always be accorded to the wife within specified limits, it was held by the Court of Appeal (reversing the decision of *Pearson*, J.) that the husband could not be restrained by injunction from removing them out of this country: *Hunt* v. *Hunt*, 28 Ch. D. 606.

Provisions as to custody are subject to control of the Court.

All such stipulations, however, with regard to custody of or access to children are by the section above cited made subject to the supervision of the Court, and are liable to be set aside in the interest of the children. This jurisdiction cannot be ousted by the insertion in the deed of an arbitration clause: *Hart* v. *Hart*, 18 Ch. D. 670; *Evershed* v. *Evershed*, 46 L. T. 690; 30 W. R. 732.

The refusal of all religious education, and the publication of a book "calculated to deprave public morals," were held to be sufficient grounds to take children from their mother, in whose custody they were in accordance with the terms of a separation deed, and to deliver them to their father: *Re Besant*, 11 Ch. D. 508.

The principal grounds on which the Court will

Form, &c., of Separation Deeds.

interfere with parental rights, in the absence of express stipulation between the father and mother, have been fully considered, *ante*, Vol. I. pp. 526, *et seq.*, and there can be no doubt that the Court would act upon the same principles in considering whether or not express stipulations as to the custody of children should be enforced: see also, *Ex parte Warner*, 4 Br. C. C. 101; *Warde* v. *Warde*, 2 Ph. 786; *Shelley* v. *Westbrooke*, Jac. 266 n.; *Symington* v. *Symington*, L. R., 2 H. L. Sc. 415; *Re Goldsworthy*, 2 Q. B. D. 75; *Re Taylor*, 4 Ch. D. 157.

Subsidiary Clauses.]—The deed will conclude with subsidiary clauses, which will vary in number and character according to the circumstances of the particular case, and the intentions of the parties. The clauses most usually introduced into separation deeds are as follows:—

Covenants for indemnity from wife's debts.

1. A covenant by the trustee or trustees to indemnify the husband from all debts which may be contracted by the wife during the separation. This covenant will, as has been seen (*ante*, p. 93), be a valuable consideration, and take the deed out of the Statutes of Fraudulent Conveyances.

Covenant for further assurance.

2. A short covenant for further assurance is often inserted, where occasion seems to require it, and where the expressions importing the statutory covenants to that effect do not seem to be applicable.

Proviso for reconciliation, &c.

3. A provision for determination of the provisions of the deed either entirely, or "except as is hereinbefore otherwise provided," in case of reconciliation of the parties, or of their divorce. This clause is sometimes omitted on the ground that the reconciliation will of itself put an end to the provisions of the deed, but it is generally better to insert an express provision to this effect rather than to have the question of the intention as to how far, if at all, the deed is to continue to operate notwithstanding reconciliation, &c., to be inferred from the provisions of the deed as a whole.

Powers of appointing trustees.

4. A clause providing who is to exercise the statutory power of appointing new trustees on a vacancy, as to which see sub tit. "SETTLEMENTS," *post*, pp. 339, *et seq.*

PRECEDENTS.

I. *DEED OF SEPARATION, the* HUSBAND *allowing the* WIFE *an* ANNUITY *during their* JOINT LIVES, *which is to be paid to her Father, the Trustee, while the Wife lives with him.* COVENANT *by the* TRUSTEE *to* INDEMNIFY *the* HUSBAND *against the* WIFE'S DEBTS. *Other* USUAL COVENANTS. PROVISO *vacating the Deed on Reconciliation* (A concise form).

THIS INDENTURE, (*a*) made the —— day of ——, 18—, BETWEEN [*husband*] of, &c., of the first part; [*wife*] the wife of the said [*husband*], now residing at, &c., of the second part; and [*trustee*], of &c., the father of the said [*wife*], of the third part: WHEREAS unhappy differences have arisen between the said [*husband*] and [*wife*], by reason whereof they have mutually agreed to live separate and apart from each other; and the said husband has agreed to make to the said [*wife*], an allowance of the annual sum of £——, during the joint lives of herself and the said [*husband*], for her maintenance and support: NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and for the considerations herein appearing the said [*husband*], so far as the covenants and stipulations herein contained ought to be performed or observed on his part, hereby covenants with the said [*wife*], and, as a separate covenant with the said [*trustee*], and the said [*wife*] with respect to, and so as to bind her separate property (*b*), so far as the covenants and stipula-

Parties.

Recital of agreement for separation.

Testatum.

Mutual covenants.

(*a*) Stamp, 10*s.*, and *ad valorem* duty at the rate of 6*d.* for every 5*l.* or fractional part of 5*l.* payable in respect of the annuity.

(*b*) This will bind all separate property which she may acquire in the future: see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 1 (4). But this sub-section is not retro-

Separation Deed.

Concise form.

tions herein contained ought to be performed or observed on her part, hereby covenants with the said [*husband*], and as a separate covenant with the said [*trustee*]; and the said [*trustee*], so far as the covenants and stipulations herein contained ought to be performed or observed by himself or by the said [*wife*], hereby covenants with the said [*husband*], as follows, that is to say:

Wife may live apart from husband.

1. The said [*wife*] may at all times hereafter live separate and apart from the said [*husband*], and free from his marital control and authority, as if she were sole and unmarried, and may from time to time reside at such place or places, and in such manner [and carry on such trade, business or occupation], as she shall from time to time think proper, without any interference on the part of the said [*husband*].

Husband and wife not to molest each other, &c.

2. Neither of them the said [*husband*] and [*wife*] shall molest, disturb, or interfere with the other of them in her or his manner of living or otherwise, or compel or endeavour to compel the other of them to cohabit or live with him or her by any legal proceedings for restitution of conjugal rights, or otherwise howsoever.

Condonation of previous offence (*c*).

3. Neither of them the said [*husband*] and [*wife*], shall take any proceedings against the other of them for the purpose of obtaining a divorce, or judicial separation, in respect of any misconduct which has, or is alleged to have taken place on the part of the other of them.

Husband to pay an annuity to wife (*d*).

4. The said [*husband*] shall during the joint lives of himself and the said [*wife*], or until they shall mutually agree to live together again, and so long as the said [*wife*] and the said [*trustee*] shall perform and observe the covenants and agreements on their respective parts herein contained, pay to the said [*wife*] an annuity or yearly sum of £—— for her

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spective, and therefore does not apply to separation deeds executed before the commencement of that Act: *Conolan* v. *Leyland*, 27 Ch. D. 632.

(*c*) This clause (as to which see *ante*, p. 106) ought not to be inserted as a matter of course without instructions. For another form of this clause see *post*, p. 119.

(*d*) Sometimes it is arranged that the husband shall make to his wife a weekly allowance, as follows:—

"The said [*husband*] shall, during the joint lives of himself and the said [*wife*], if they shall so long mutually agree to live separately from each other, pay to the said [*wife*], for her

Separation Deed.
Concise form.

separate use, but without power of anticipation, by equal quarterly payments on the usual quarter days, the first of such payments to be made on the —— day of ——, 18—, which annuity shall be apportionable according to law at the commencement and termination thereof (*e*): PROVIDED ALWAYS that such annuity shall be payable as aforesaid, so long as the said [*wife*] shall live a chaste life.

Dum casta clause (*f*).

Annuity to be paid to wife's father so long as she shall reside with him (*g*).

5. PROVIDED ALWAYS and it is hereby agreed, that so long as the said [*wife*] shall reside with her father, the said [*trustee*], the said annuity or yearly sum of £——, shall be paid to the said trustee at the times and in manner aforesaid in trust for the said [*wife*]; and the receipt of the said [*trustee*], signed by him, shall be a good and sufficient discharge for so much of the said annuity or yearly sum of £——, as shall be therein acknowledged or expressed to be received, and that the said [*husband*] shall not be bound to see to the application thereof.

Chattels to be wife's separate property.

6. ALL articles of wearing apparel and personal ornament, and also all the articles of furniture and household effects specified in the schedule hereunder written, which have been delivered by the said [*husband*] to the said [*wife*], previous to the execution of these presents (*h*), as she hereby acknow-

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separate use but without power of anticipation on every Saturday commencing on the —— day of —— next, the clear weekly sum of £——.

As to when the husband's offer to resume cohabitation determines the wife's right to her annuity, see *ante*, p. 109.

(*e*) Under the Apportionment Act, 1870 (33 & 34 Vict. c. 35), annuities are considerations accruing from day to day, and are accordingly apportionable in respect of time: see *ante*, sub tit. ANNUITIES, Vol. I., pp. 687 *et seq.* Even before this Act a life annuity settled by a man on his wife for her separate maintenance, in exception to the general rule, entitled the wife to a proportional sum for the period intervening between the last day of payment and her decease: *Howell* v. *Hanforth*, 2 W. Bl. 1016; *Hay* v. *Palmer*, 2 P. Wms. 502; *Sheppard* v. *Wilson*, 4 Hare, 395.

(*f*) This is not a usual clause, see *ante*, p. 107.

(*g*) This clause is not usual and should not be inserted without instructions, but may occasionally be found useful with or without modification.

(*h*) Possession of the chattels should be delivered to the wife before the execution of the deed. A covenant by the husband to deliver the chattels at a future time would not be valid as against his creditors, unless registered as a bill of sale under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); but, inasmuch as such a covenant would not fall within the mischief of the Bills of Sale

Separation Deed.

Concise form.

ledges, shall belong to, and may be retained or disposed of at pleasure by the said [*wife*] as her separate property.

Trustee to indemnify husband against wife's debts.

7. THE SAID [*trustee*] shall at all times hereafter keep indemnified the said [*husband*], his heirs, executors, and administrators, against all the debts and liabilities which the said [*wife*] has already contracted or incurred, or which she shall or may at any time hereafter contract or incur, and against all actions, proceedings, accounts, claims, demands, costs, charges, losses, damages, and expenses for, or on account of such debts or liabilities, or anything in anywise relating to the premises.

Husband if called on to pay wife's debts may deduct amount from annuity.

8. IN CASE the said [*husband*] shall at any time or times hereafter be called upon to pay or discharge, and shall actually pay or discharge any debt or liability which the said [*wife*] has already contracted or incurred, or which she shall or may at any time hereafter contract or incur, then, and in every such case, it shall be lawful for the said [*husband*] to deduct, retain, and reimburse to himself out of the said annuity of £——, the amount which he the said [*husband*] shall have so paid in respect of such debt or liability, together with all costs and expenses which he shall have paid or incurred on account thereof; but so that this present proviso shall not render the said [*husband*] liable to the payment of any debts of the said [*wife*], or prejudice any right or remedy of the said [*husband*] under the covenant for indemnity of the said [*trustee*] hereinbefore contained.

Provision for reconciliation or divorce.

9. PROVIDED ALWAYS, that in case the said [*husband*] and [*wife*] shall at any time hereafter with their mutual consent come together, and cohabit with each other [or if their marriage shall be dissolved or if they shall be judicially separated from each other in respect of anything done or suffered by either party after the execution of these presents], then, and in such case [*or*, then and in either of such cases], the said annuity of £——, shall cease and be no longer payable, and thenceforth all the covenants and provisions herein contained shall become void, but without prejudice to any act previously done hereunder, or any proceedings on the part of any of the parties hereto in respect of any breach then pre-

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Act, 1882 (45 & 46 Vict. c. 43), it would, though unregistered, be valid against the husband himself, and persons, other than creditors, claiming under him.

viously committed of all or any of the said covenants or provisoes. Separation Deed.

10. The statutory power of appointing new trustees of these presents in the place of the said [*trustee*] or of any trustee to be appointed in his place shall be vested in the said [*wife*]. *Concise form.* Appointment of new trustees.

In witness, &c.

The Schedule above referred to.

II. *DEED OF SEPARATION between Husband and Wife. Special Clause against* Molestation *by* Husband. Settlement *by the* Husband *of a Sum of* Stock *for the benefit of the* Wife, *for her* Life, *with remainders for the benefit of* herself *and the* Children *of the Marriage.* Provisions *as to the* Custody, Maintenance, *&c., of* Children. *Usual* Indemnity Clause *by Trustees.*

THIS INDENTURE (*i*), made the —— day of ——, 18—, Between [*husband*], of, &c., of the one part, [*wife*], of the second part, and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: Whereas the marriage between the said [*husband*] and [*wife*], his wife, took place on or about the —— day of ——, 18—, and there is issue of the marriage —— children, namely [*state names of children*]; And whereas unhappy differences have arisen between the said [*husband*] and [*wife*], in consequence whereof they have mutually agreed to live separate and apart from each other: And the said [*husband*] has agreed to make the said [*wife*] an allowance of the annual sum of £—— during the joint lives of them the said [*husband*] and [*wife*] for the separate use of her the said [*wife*], and the clothing, maintenance, and education of the said [*children*], so long as they shall remain in her custody or under her control under the provisions in that behalf hereinafter contained: And the said [*husband*] has agreed that a sum of £—— Preference Stock in the ——

Parties.

Recitals: of marriage and birth of children;

of agreement for separation;

of agreement by husband to allow sum a year;

of agreement to vest sum in names of trustees;

(*i*) Stamp, 10*s.*, and *ad valorem* duty as on a settlement at the rate of 5*s.* for every 100*l.* or fractional part of 100*l.* settled.

II. Separation Deed, Providing for Settlement of Property, and Custody of Children.

Railway Company, the property of him the said [*husband*], shall be vested in trustees, who shall stand possessed thereof, and the dividends, interest, and annual produce upon such trusts as are hereinafter declared of and concerning the same: And whereas the said sum of £—— stock has been this day transferred into the names of the said [*trustees*], and the same is accordingly now standing in their names in the books of the said company as they the said [*trustees*] hereby respectively acknowledge; And whereas the said [*trustees*] have, at the request of the said [*husband*] and [*wife*], agreed to act as trustees of these presents for the purpose of the arrangements intended to be hereby made, and to enter into the covenants on their part and stipulations hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for the consideration herein appearing, the said [*husband*], so far as the covenants and stipulations herein contained ought to be performed or observed on the part of himself, his heirs, executors, or administrators, hereby covenants with the said [*wife*], and as a separate covenant with the said [*trustees*]; And the said [*wife*], with respect to, and so as to bind all the separate estate and property of or to which she is now or may hereafter become possessed or entitled, or which she is now or may hereafter have power to charge or bind, so far as regards the covenants and stipulations herein contained ought to be performed or observed, on the part of herself, her heirs, executors, or administrators, hereby covenants with the said [*husband*], and, as a separate covenant with the said [*trustees*]; And the said [*trustees*], so far as the covenants and stipulations herein contained ought to be performed or observed, on the part of the said [*wife*], or of them the said [*trustees*], or their respective heirs, executors, or administrators, or any of them, hereby respectively covenant with the said [*husband*] as follows, that is to say:

of transfer of sum;

of agreement of trustees to act.

Testatum.

Wife may live apart from husband.

1. [*Proviso that the wife may live apart from her husband, ut ante, p.* 114.]

Covenant against molestation by husband.

2. The said [*husband*] shall not, nor will molest, disturb, or interfere with the said [*wife*] in her manner of living or otherwise, or compel or endeavour to compel her to cohabit or live with him by any legal proceedings for restitution of his conjugal rights or otherwise howsoever, or sue, prosecute, or in any way molest or disturb any member or members of her

family or any other person or persons for receiving, harbouring, protecting, or assisting her.

II. Separation Deed, Providing for Settlement of Property, and Custody of Children.

3. The said [*wife*] shall not nor will molest, disturb, or interfere with the said [*husband*], nor at any time or times hereafter commence or institute any action or proceedings for restitution of conjugal rights, or compel or attempt to compel him to allow to her any alimony or maintenance for herself, or the said children, other than such allowance as is hereinafter provided.

Covenant against molestation by wife.

4. No proceedings shall be instituted or prosecuted by or on behalf of either of them the said [*husband*] and [*wife*] against the other of them for the purpose of obtaining a divorce or judicial separation, or otherwise in respect of any cause of complaint which now exists or has arisen before the date of these presents; and all misconduct (if any) which has been committed or permitted by either of them against the other shall be deemed to have been hereby forgiven and condoned; And in case at any time hereafter any proceedings shall be instituted or prosecuted by either of them against the other in respect of any cause of complaint which may arise hereafter, no misconduct which has, or is alleged to have been committed or permitted before the execution of these presents, nor any act, matter, or thing relating to any such misconduct, shall be pleaded, or alleged, or admitted in evidence.

Mutual covenants against proceedings for divorce, &c.

5. The said [*trustees*] and the survivor of them, and the executors, administrators, or assigns of such survivor, or other the trustees or trustee for the time being of these presents, (hereinafter collectively referred to as the said trustees or trustee,) shall either allow the said sum of £—— Preference Stock, or any part thereof, to remain in the actual state of investment thereof, or shall at any time or times, with the consent of the said [*husband*] and [*wife*], during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor at the discretion of the said trustees or trustee, to sell the same or any part thereof, and invest the proceeds of such sale in their or his names or name in, &c. [*continue investment clause: see post, sub tit.* Settlements].

Trust for investment.

6. The said trustees or trustee shall stand possessed of and interested in the said sum of £—— or the investments for the time being representing the same, and dividends,

Trusts of settled fund.

II. Separation Deed, Providing for Settlement of Property, and Custody of Children.

interest, and income thereof respectively, upon the trusts following, that is to say: In trust to pay unto the said [*wife*] or allow her to receive the income of such trust fund during her life, but without power of anticipation, as well for the maintenance and support of herself as for the maintenance, clothing, and education of the said [*children*] during their respective minorities: And from and after the death of the said [*wife*], if she shall die in the lifetime of the said [*husband*], then in trust to pay unto the said [*husband*], or allow him to receive the income of the said trust fund during his life; And from and after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of and interested in the capital and future income of the said trust fund, In trust for such one or more of the said [*children*] as, being sons or a son, shall attain the age of twenty-one years, or being daughters or a daughter, shall attain that age or marry under that age, and if more than one in equal shares: But if all the said children shall die before attaining a vested interest in the said trust fund, then the trustees or trustee for the time being shall, from and after the death of the said [*husband*], stand possessed of and interested in the capital and future income of the said trust fund [or of so much thereof as shall not have been applied under any of the trusts herein expressed], as to one equal moiety of such capital and income, In trust for the said [*husband*] absolutely; And as to the other equal moiety thereof, upon and for such trusts, interests and purposes as the said [*wife*] shall by deed, will, or codicil appoint, and in default of and subject to any such appointment upon trust for the next of kin of the said [*wife*] as if she had died intestate and without ever having been married. [*Add advancement clause, if desired: see post,* sub tit. "SETTLEMENTS."]

Wife to have her chattels for her separate use.

7. THE said [*husband*] shall permit and suffer the said [*wife*] to have, possess, and enjoy for her exclusive use and benefit in the same manner in all respects as if she were a *feme sole* all the articles of wearing apparel and personal use and ornament, and all personal property and effects whatsoever now in her possession.

Surviving husband excluded from wife's property.

8. IF the said [*wife*] shall die in the lifetime of the sai [*husband*] all her separate estate and property, real and personal, of which she shall not have disposed in her lifetime, or by will, shall, subject to her debts and liabilities, go and

II. Separation Deed, Providing for Settlement of Property, and Custody of Children.

belong to the persons or person who would have become entitled thereto, if the said [*wife*] had then died intestate and without ever having been married.

Husband to allow wife's will to be proved.

9. If the said [*wife*] shall die in the lifetime of the said [*husband*], he shall permit her will (if any) to be proved, or administration to her personal estate and effects to be taken out by the persons or person who would have been entitled so to do, if she had then died without ever having been married.

Wife to have custody of children.

10. The said [*wife*] shall have the sole custody and control of and over all and every of the said [*children*] and of their education and bringing up, until they shall respectively attain the age of —— years, without any interference on the part of the said [*husband*].

Provision as to maintenance of children.

11. The said [*wife*] hereby accepts the provision made as aforesaid by clause 6 hereof as ample and sufficient for the maintenance and support of herself and for the maintenance, clothing, and education of the said [*children*] until they shall respectively attain the age of —— years, and the said [*wife*] shall accordingly provide and pay for the maintenance, clothing, and education of all and every of the said [*children*] until they shall attain that age out of her own monies, including the income of the said trust fund hereby made payable to her during her life as aforesaid. [But the said [*husband*] shall pay the funeral expenses of any child who shall die while residing or being with or under the control of the said [*wife*]].

Provision as to education, &c., of sons.

12. The said [*male children*] shall, as soon as they shall respectively attain the age of —— years, be placed at the expense of the said [*husband*] at such schools in England, or, with the previous consent in writing of the said [*wife*], [*or, if preferred*, of the trustees or trustee for the time being of these presents,] elsewhere, as he shall from time to time think fit; and shall thereafter pass their holidays or any other interval of time during which they shall not be at any school, at such places and in such manner as the trustees or trustee for the time being of these presents shall from time to time direct, having regard to the reasonable wishes of the said [*husband*] and [*wife*].

Provision as to education, &c., of daughters.

13. The said [*wife*] shall have full liberty at her own expense either to place all and every of the said [*female children*], at such schools in England [or elsewhere], as she

II. Separation Deed, Providing for Settlement of Property, and Custody of Children.

shall from time to time think fit, or to keep them in her own custody, maintain, and educate them until they shall respectively attain the age of twenty-one or marry under that age, at such place or places in England [or elsewhere], as she may from time to time reside in: And such of them the said [*female children*], as shall for the time being be at such school, shall pass their holidays with the said [*wife*], or with such persons or person as she shall from time to time direct.

Covenant for indemnity of husband against wife's debts.

14. THE said [*trustees*], their heirs, executors, or administrators, shall, and will at all times hereafter effectually keep harmless and indemnified the said [*husband*], his heirs, executors, and administrators, from and against all debts and liabilities which the said [*wife*] shall or may hereafter contract or incur, and from and against all actions, proceedings, accounts, claims, demands, costs, charges, losses, damages, and expenses whatsoever, for or on account of any such debts or liabilities, or for or on account of any act, matter, or thing whatsoever hereafter to be contracted, done or committed by the said [*wife*], under the powers and authorities herein contained or otherwise, or to be occasioned by or with her default, privity, means, or procurement, or on account or by reason of the board, lodging, clothing, maintenance, and education of the said [*children*], or any of them, the costs and expenses whereof it is hereby agreed shall be exclusively paid and borne by the said [*wife*] out of her own monies.

Covenant for further assurance.

15. EACH of them the said [*husband*] and [*wife*], or their respective heirs, executors, or administrators, shall and will from time to time and at all times hereafter, execute and do all such assurances and things as the other of them, or his or her executors, administrators, or assigns, or the trustees or trustee for the time being of these presents, shall reasonably require, for the purpose of giving full effect to these presents and the covenants, stipulations and provisions herein contained.

Provision for reconciliation, &c.

Clause as to destruction of settled fund on reconciliation.

16. [*Provision for reconciliation, divorce, &c., ut ante, p.* 116*; and continue, if such is the intention, as follows:*] And in such case the trustees or trustee for the time being of these presents shall stand possessed of and interested in the said trust fund, and the income thereof or so much thereof as shall not have been applied or disposed of, under or by virtue of these presents upon trust for the said [*husband*] absolutely or as he shall direct.

17. THE statutory power of appointing new trustees of these presents in the place of the said [*husband's trustee*], or of any trustee to be appointed in his place shall be vested in the said [*husband*]; and the statutory power of appointing new trustees in the place of the said [*wife's trustee*], or of any the trustee to be appointed in his place shall be vested in said [*wife*]. Provision as to appointment of new trustees.

IN WITNESS, &c.

III. *DEED OF SEPARATION on* COMPROMISE *of proceedings for* DIVORCE *brought by the* WIFE, *who purchases an* ANNUITY *in the names of Trustees for benefit of the* HUSBAND.

THIS INDENTURE (*k*), made the —— day of —— 18—, BETWEEN [*husband*] of &c., of the first part, [*wife*] of &c., of the second part, and [*trustee*], of &c., and [*trustee*], of &c., of the third part: WHEREAS by an agreement in writing, dated the —— day of ——, 18—, and made between [*parties*], it was agreed that a petition therein referred to, presented in the Divorce Division of Her Majesty's High Court of Justice by the said [*wife*], for the dissolution of her marriage with the said [*husband*], should be dismissed upon the terms and conditions herein mentioned, and it was thereby agreed, amongst other things, that the said [*husband*] and [*wife*] should live separately and apart from each other, and that the said [*wife*] should purchase in the names of the said [*trustees*] a government annuity of £——, during the life and for the interest of the said [*husband*], so long as he should continue to live separate and apart from the said [*wife*], and that a deed of separation containing all usual clauses (except the clauses usually inserted in such a deed for the husband's indemnity by a trustee from his wife's debts), should be executed by the said parties, and that the costs of the said petition should be paid by the said [*husband*] and [*wife*] in equal shares: AND WHEREAS in pursuance of the said agree-

Parties.

Recitals: of agreement that wife's petition for divorce should be dismissed, and as to terms of separation;

of purchase of annuity for husband.

(*k*) Stamp, 10*s.*, and *ad valorem* duty in respect of the annuity, see *ante*, p. 113, note (*a*).

III. Separation Deed on Compromise of Divorce Proceedings.

ment the said [*wife*] has purchased in the names of the said [*trustees*] a government annuity for the sum of £——, during the life of and in trust for the said [*husband*]: NOW THIS INDENTURE WITNESSETH that for effectuating the agreement and in consideration of the covenant hereinafter contained on the part of the said [*wife*], and of such release of the estate and interest of the said [*wife*], interest to the said hereditaments and premises as aforesaid, the said [*husband*] hereby covenants with the said [*wife*], and as a separate covenant with the said [*trustees*], that the said [*wife*] may from time to time and at all times hereafter live separate and apart from the said [*husband*], her husband, as if she were sole and unmarried, and that she shall be free from the power, command, restraint, control, and authority of him the said [*husband*], and shall and may live and reside at such place or places, and in such manner as to her shall from time to time seem meet; And that he, the said [*husband*], shall not nor will molest nor disturb in any way whatsoever, nor endeavour to molest or disturb the said [*wife*], by any legal proceeding or proceedings, or in any way whatsoever, in her person or in her manner of living, or in any way endeavour to compel her the said [*wife*] to cohabit or live with him the said [*husband*], or to enforce any restitution of conjugal rights, nor shall or will without the consent of the said [*wife*] visit her, or knowingly come into any house or place where she shall or may reside, or be, or send or cause to be sent any letter or message to her, nor shall nor will sue or prosecute any person or persons for receiving, harbouring, lodging, or assisting her, but that she the said [*wife*], notwithstanding coverture may in all things live as if she were sole and unmarried without the restraint of the said [*husband*]: AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of the said agreement, and for the considerations aforesaid, she the said [*wife*], hereby, for the purpose of binding any property settled to her separate use, covenants with the said [*husband*], his heirs and administrators, that she the said [*wife*] shall not, nor will at any time

Testatum.

Covenants by husband:

that wife may live apart from him;

not to molest her (*l*).

Further *testatum.*

Covenant by wife (*m*) not to molest husband.

(*l*) This covenant is more full and explicit as regards molestation than the covenant given *ante*, p. 118.

(*m*) In this case the covenant of the wife only was taken, the trustees objecting to concur therein.

III. Separation Deed on Compromise of Divorce Proceedings.

hereafter molest or disturb nor endeavour to molest or disturb the said [*husband*], or in any way whatsoever, or in any way compel or endeavour to compel him the said [*husband*] to cohabit or live with her the said [*wife*], or to enforce any restitution of conjugal rights, nor shall require or by any means whatsoever endeavour to compel the said [*husband*] to allow her any greater or other alimony or maintenance than the said annuity of £——: PROVIDED ALWAYS, and it is hereby agreed and declared that the said [*trustees*] shall quarterly during the life of the said [*husband*], so long as he shall continue to live separate and apart from the said [*wife*], pay to the said [*husband*] the said annuity of £——, by equal half-yearly payments on the —— day of ——, and the —— day of ——, the first of such payments to be made on the —— day of ——, 18—: PROVIDED ALWAYS that if the said [*husband*] and [*wife*] shall with their mutual consent come together and live as man and wife, or if the said [*husband*] shall commit any breach of the covenant or agreement hereinbefore contained on his part, the provision made for him by the said annuity of £——, shall thereupon absolutely cease and be void, and thereafter the said annuity shall be payable and be held in trust for the said [*wife*], her executors, administrators and assigns: PROVIDED ALWAYS, and it is hereby agreed and declared that in case the said [*husband*] and [*wife*] shall at any time hereafter with their mutual consent come together and cohabit as man and wife, then and in such case and thenceforth the covenants and agreements herein contained shall become null and void, except as hereinbefore provided with regard to the said annuity: PROVIDED LASTLY, that the statutory powers appointing new trustees, or a new trustee of these presents, when and so often as any vacancy shall occur, shall vest in, and be exercisable by the said [*wife*].

Declaration of trust of annuity.

Cesser of annuity on breach of husband's covenants.

Proviso for reconciliation.

Appointment of new trustees.

IN WITNESS, &c.

SETTLEMENTS.

PRELIMINARY DISSERTATION.

CHAPTER I.

INTRODUCTORY CHAPTER—AS TO SETTLEMENTS GENERALLY.

	PAGE		PAGE
What is a Settlement	126	*Advisability of Settlements on Marriage*	129
Different Kinds of Settlements	127		

Scope of the present dissertation.

What is a Settlement.]—A full and detailed examination of the law relating to settlements of property would require an amount of space far in excess of that which is at the disposal of the Editor of this work; it must, therefore, suffice in this dissertation, in the first place briefly to notice some practical points with regard to the nature, scope, and operation of such settlements, and next to consider the form and contents of instruments whereby settlements are created, with special reference to the question as to what limitations, covenants, and provisions ought to be inserted therein under various circumstances.

Settlements, how created.

Settlements of property may be created either by public authority (*a*), that is to say, by means of private Acts of Parliament, or by private persons; the latter class of settlements will here alone be considered. Private persons may make effectual settlements either by an act *inter vivos*, or by testa-

(*a*) As to the creation of settlements by public authority, see vol. i. Vaizey on Settlements, ch. 1, s. 2, pp. 6 *et seq.*

What is a Settlement.

mentary disposition. Many points which have come before the Courts with regard to the settlement have arisen on the construction of wills, and incidental reference to such decisions will be frequently found in the following pages; but the main purpose of the present Dissertation is to consider the nature, operation, and form of settlements *inter vivos*, either completely effected by deed, or agreed to be made by executory articles or contracts.

Definition of "settlement."

A "settlement" may, for the present purpose, be defined in the words of Mr. Vaizey, in his admirable "Treatise on the Law of Settlements of Property" (at p. 1), as "a legal act designed to regulate during a specified period the enjoyment of property, and to provide during the same period for the safe custody and prudent management of the subject-matter of that property" (*b*). Settlements thus essentially involve some modification of absolute proprietary right over property, and they usually, though not necessarily, create successive estates or interests therein.

Distinction between real and personal settlements.

Different Kinds of Settlements.]—Settlements are of two kinds, according as the nature of the property included therein consists of realty or personalty, and are termed "real settlements" or "personal settlements" accordingly. The scope and objects of these two classes of settlements are in some respects essentially different. In a real settlement the intention of the parties is generally to maintain the settled property as far as possible in its actual condition throughout the successive limitations. But the extensive powers of alienation conferred on tenants for life by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), have rendered the effectuation of this intention defeasible. The

(*b*) The Stamp Act, 1870 (33 & 34 Vict. c. 97, Sched.), the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), sect. 2, the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 2, and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 47, (3), contain definitions of the term "settlement" for the purposes of those respective Acts. These definitions will be noticed in the following pages, as occasion requires.

Different Kinds of Settlements.

settled property will still, nevertheless, legally retain its nature as realty, notwithstanding any changes in its subject-matter, and will go in accordance with the limitations and provisions of the settlement, as if it were the land originally settled. Again, in real settlements, the beneficial interest in the bulk of the settled property is generally limited so as to belong to only one person at a time, usually the settlor for his life, with remainders in favour of his eldest son and other sons successively for their respective lives, subject to charges for the benefit of other members of the family. In personal settlements, on the contrary, the property comprised therein is regarded as merely an investment, and is expressly made liable to be varied in its subject-matter by changes of investment as may seem from time to time advisable; and the settled property is usually, after (it may be) the determination of one or more life interests therein, made divisible among the children of the marriage or other ultimate beneficiaries.

Settlement of land as personalty.

Sometimes, however, land is settled as personalty by conveying it to trustees upon trust for sale, either immediately, or upon the happening of some future event, whereby the land is converted into personalty as from the execution of the settlement (*c*), and the trusts of the proceeds of sale are then declared as in a personal settlement. By this expedient any change in the subject-matter of the settled property may be practically postponed for a considerable period, but of course estates tail therein cannot be created.

Settlement of personalty as land.

Conversely, money, or other personal property, is sometimes settled as land. The property is directed

(*c*) It is generally advisable to convey the land to the trustees for sale by a deed directing that they shall hold the proceeds of sale upon the trusts declared by the settlement, which is usually referred to as "an indenture of even date with" the conveyance; and to declare the trusts of the proceeds of sale with the ancillary provisions by a separate deed of settlement. By this means, having regard to the power of the trustees for sale to give effectual discharges to purchasers, notice of the trusts is kept off the title to the land.

Different kinds of Settlements.

to be laid out in the purchase of land, and so immediately converted into realty, and the land so to be purchased is limited in successive estates, as in a real settlement. These limitations will attach to the money immediately upon the execution of the deed.

Settlements for valuable consideration, and voluntary settlement.

Settlements may also be classified according as they are made for valuable consideration or are merely voluntary. Marriage is the most valuable consideration, and consequently all settlements made before and in consideration of marriage, and also all post-nuptial settlements made in pursuance of marriage articles, are included in the former class. To the same class belong also settlements made in consideration of the payment of money or money's worth, and also most deeds providing for the separation of husband and wife (*d*).

Family settlements.

Family settlements of real property are not unfrequently made on the occasion of marriages, but they are also often made when the first tenant in tail attains his majority. The property is then disentailed and resettled so as to carry on the limitations. Such settlements, unless made on marriage, are, generally speaking, merely voluntary settlements, the law as to which will be considered later, see *post*, pp. 188 *et seq.*

Advisability of settlements on marriage, generally.

Advisability of Settlements on Marriage.]—Notwithstanding the changes effected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), in the position and rights of a married woman the necessity for settlements upon marriage has been by no means superseded. That Act, by sects. 2 and 5, has conferred upon any woman married since the commencement of the Act, or married before that date as to property to which her title has accrued subsequently to that date, notwithstanding coverture, an absolute power of disposal over her property, whether vested in possession, reversionary, or con-

(*d*) As to what consideration will support a separation deed against creditors, see *ante*, sub tit. "SEPARATION," p. 93.

Advisability of Marriage Settlements.

tingent; but that very freedom of disposal seems to render it generally advisable for the wife's protection to place some restraint upon the exercise of that power. And having regard to the liability to bankruptcy now imposed upon a married woman trading separately from her husband (see sect. 1 (5) of the Act), it may often be advisable upon the marriage of a female trader, or a woman intending to carry on a separate trade, for the purpose of protecting her property against her creditors, to adopt a device similar to that hitherto adopted on the marriage of a male trader, and to settle the first life interest in her property on the husband. Again, no less than formerly, the main object of a personal settlement on marriage still remains in force, viz., to give to the husband and wife during their respective lives the enjoyment of the settled property, while securing an ultimate provision for the issue of the intended marriage. Moreover, it must be remembered that either party may bargain upon marriage for an interest in the property of the other, for which bargain the marriage will of itself be a valuable consideration.

As to settlement of small fortunes.

A question sometimes arises as to the expediency of creating settlements of sums of small amount, the income of which would be insufficient to provide for the maintenance of the family, should other resources fail, but which, if left out of settlement, might perhaps be turned to profitable account. The answer must depend on the circumstances of each individual case, and no general rule can be laid down. But it must be remembered that in case the husband's death should take place before any of the children are able to earn a livelihood, an assured income, however small, may be of the greatest importance to his widow and issue.

CHAPTER II.

WHO MAY MAKE SETTLEMENTS.

	PAGE		PAGE
As to Settlors generally	131	*Disability of Bankruptcy*	159
Settlements by Married Women	131	*As to Felons, &c.*	161
Disability of Infancy	143	*As to Aliens*	161
Disability of Lunacy	159	*Settlements on Marriages with Foreigners*	161

As to Settlors generally.]—Settlements may be made *inter vivos* by private persons either by conveyance or transfer of property, or by contract. And all persons who have property, and are competent to dispose of it in the one case, or who are competent to contract in the other case, are competent to make settlements. If the settlor is entitled only to an equitable or beneficial interest in property, the legal estate or interest therein being outstanding, he is nevertheless competent to declare such trusts as he thinks proper of the property, and the legal owner must hold the property upon the trusts so declared: *Tierney* v. *Wood*, 19 Beav. 330; see *Kronheim* v. *Johnson*, 7 Ch. D., at p. 66.

Who can make settlements generally.

Settlements by Married Women.]—The powers of disposition over property of married women has already been discussed at length, *ante*, sub tit. "Acknowledgments," Vol. I., pp. 208 *et seq.* This subject need therefore be very briefly noticed in this place. A married woman is at common law generally incapable of making a valid deed or contract, and consequently cannot, independently of legislative enactment, settle or agree to settle property. She can, however, with the concurrence of her husband, dispose of, and therefore settle land, or the proceeds of sale of land, by deed acknowledged under the Fines and Recoveries Act (3 & 4

Power of married women to dispose of property.

Married Women.

Will. 4, c. 74), sects. 77 to 80; and in certain cases the husband's consent may, by order of the Court, be dispensed with: see sect. 91 of that Act. She can also, in equity, unless restrained from anticipation, dispose of real or personal property held on trust for her separate use, or enter into valid contracts in relation thereto, and consequently can settle or agree to settle such property. Moreover, she can under Malins' Act (20 & 21 Vict. c. 57), with the concurrence of her husband, by deed duly acknowledged, dispose, by way of settlement or otherwise, of reversionary interests in personalty, and release powers over such property; but this Act does not enable a married woman to dispose of personalty settled on her marriage: see sect. 4 of the Act. See the Act set out fully, *ante*, Vol. I., pp. 249, 250. And, lastly, she can effectually exercise, or concur in exercising, common law authorities, and powers of appointing uses, and equitable powers. The concurrence in settlements, or in deeds preliminary to settlements, of married women, usually the mothers of intending husbands or wives, is often necessary for the purpose of exercising such authorities and powers.

The Married Women's Property Act, 1882.

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which has an important bearing both on the law and practice of settlements, was passed for the purpose of consolidating and amending the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), and the Amending Act of 1874 (37 & 38 Vict. c. 59), both of which it repeals (by sect. 22). The Act now in force came into operation on the 1st of January, 1883, and has so materially altered the position of a married woman as regards her rights over property (*a*), with their consequential

(*a*) It would seem that her status remains unaffected, except as regards proprietory rights to property: see per *Cotton*, L.J., in *Symonds* v. *Hallett*, 24 Ch. D. at p. 351. In *Re March, Mander* v. *Harris*, 27 Ch. D. 166, and in *Re Jupp, Jupp* v. *Blackwell*, 39 Ch. D. 148, it was held that the old rule—that under a gift to husband and wife, and a third party, the husband and wife take only a moiety—still prevails, and that whether the instrument under which the gift was made was before or after the 1st January,

Married Women.

liabilities, that it will be convenient to refer briefly to its provisions, with particular reference to the subject of settlements, especially as numerous points arising under the Act have been decided since the first volume of this work was published.

Married woman to be capable of holding property and contracting as a *feme sole*.

By sect. 1 (*b*), sub-sect. (1), a married woman (*c*) is rendered capable of acquiring (*d*), holding, and disposing by will (*e*) or otherwise (*f*) of any real or personal property (*g*) as her separate property as if she were a *feme sole* without the intervention of any

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1883 : see for a statement of the law on this point, per *Wills*, J., in *Butler* v. *Butler*, 14 Q. B. D. 835, 836. "As between her and the grantor, she takes the same now as before the Act, but as between herself and her husband, what she takes is her separate property," per *Kay*, J., *Jupp* v. *Blackwell*, *supra*, at p. 153 ; see also *Re Onslow*, *Plowden* v. *Gayford*, 29 Ch. D. 622.

(*b*) This section is set out verbatim, Vol. I. p. 225.

(*c*) Whether married before or after 1st January, 1883.

(*d*) The acquisition must be subsequent to 1st January, 1883, in the case of a woman married before : *Re Harris' Settled Estates*, 28 Ch. D. 171.

(*e*) The testamentary *capacity* is hereby increased, and a will made by a married woman (after 1st January, 1883) need not be republished if she survive her husband. See for law before, *Willock* v. *Noble*, L. R. 7 H. L. 580.

But this section dealing only with the general disabilities of a married woman must not be treated as repealing a prior statute expressly prohibiting the exercise by her of some particular power, *e.g.*, a married woman cannot now any more than before this Act make any gift, grant or alienation for the purpose of building churches and chapels under 43 Geo. 3, c. 108, without her husband, and consequently a legacy by the will of a married woman for that purpose will still be void : *Re Smith's Estate*, *Clements* v. *Ward*, 35 Ch. D. 589.

This sub-section applies only to what is done by the married woman during coverture in relation to property of which she is *then* possessed, and a will made since the Act by a woman married before the Act will not pass property which she may have acquired since the death of her husband : per *Pearson*, J., in *Re Price*, *Stafford* v. *Stafford*, 28 Ch. D. 709.

(*f*) This section does not alter the devolution on the death of the wife of property which during her life belonged to her for her separate use, and which she did not dispose of by will. Consequently since this Act, as before, the husband is entitled to such undisposed of estate to the exclusion of the wife's next of kin : *Re Lambert's Estate*, *Stanton* v. *Lambert*, 39 Ch. D. 626. As to curtesy, see *post*, pp. 361 *et seq.*

(*g*) Including a "chose in action." For an historical review of the meaning of this word, see *Colonial Bank* v. *Whinney*, 30 Ch. D. 261 ; 11 App. Ca. 426.

Married Women.

trustee; and by sub-sect. (2) she is rendered capable of entering into and rendering herself liable in respect of and to the extent of her separate property on a contract, and of suing and being sued (*h*) either in contract or in tort as if she were a *feme sole;* while by sub-sect. (3), every contract entered into by a married woman is *primâ facie* to be deemed (*i*) to be entered into with respect to and to bind her separate property unless the contrary be shown (*k*). And by

(*h*) For form of judgment against a married woman under this sub-section (1), see *Scott* v. *Morley*, 20 Q. B. D. at p. 132. "It is adjudged that the plaintiff do recover £—— and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of sect. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

A judgment for damages or costs is limited to the separate estate, and creates no personal liability: *ibid.*

Where a woman, married between 1874 and 1883, is sued for a debt contracted before marriage, judgment may be entered against her in the above form without proof of the existence of any separate estate at the time of the judgment: *Downe* v. *Fletcher*, 21 Q. B. D. 11.

But an order for sequestration against a married woman may be made in a general form without expressly defining the property, but cannot be enforced as against future income as to which the married woman is restrained from anticipation: *Hyde* v. *Hyde*, 13 P. D. 166.

(*i*) This is an alteration in the law; previously there was no such presumption. "In order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and whether it was so or not is a question to be judged of by this Court upon all the circumstances of the case": per *Turner*, L.J., in *Johnson* v. *Gallagher*, 3 De G. F. & J. at p. 515.

See now per *Lindley*, L.J., in *Palliser* v. *Gurney*, 19 Q. B. D. 519; and see *Re Shakespear*, *Deakin* v. *Lakin*, 30 Ch. D. 169.

This clause presupposes some contract entered into by a married woman having separate property at the time, otherwise there is no contract at all: *Palliser* v. *Gurney*, *supra*. A person suing a married woman upon a contract must give evidence that she had separate property at the time when the contract was made: *ibid.* And separate property which at the time she could deal with. See *Harrison* v. *Harrison*, 13 P. D. 180, 184, 187, where the separate property was inalienable.

(*k*) The fact that the only separate property which the married woman has at the date of the contract is inalienable "shows the contrary" within this clause: *Harrison* v. *Harrison*, *supra*.

Married Women.

sub-sect. (4), every contract (*l*) entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire (*m*). By sub-sect. (5), every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws (*n*) in the same way as if she were a *feme sole*.

(*l*) This sub-section is not retrospective so as to include contracts entered into before the commencement of the Act: *Conolan* v. *Leyland*, 27 Ch. D. 632; affirmed, *Turnbull* v. *Forman*, 15 Q. B. D. 234; *Re Roper, Roper* v. *Doncaster*, 39 Ch. D. 482.

(*m*) This is an alteration of the law previously existing: *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454.

This clause must be read with clause 2, and the effect of the two clauses is that at the date of the contract the married woman must have *some* separate property, otherwise there is no contract; but when once a contract is established then not only her then existing but all future acquired separate property is affected by it: *Re Shakespear, Deakin* v. *Lakin*, 30 Ch. D. 169; approved by C. A. sitting as Divisional Court; *Palliser* v. *Gurney*, 19 Q. B. D. 519; and see *Draycott* v. *Harrison*, 17 Q. B. D. 147; *Beckett* v. *Tasker*, 19 Q. B. D. 7.

In the last case it was held that separate property, subject to a restraint on anticipation, did not on the death of the husband become separate property acquired after the date of the contract within clause 4, so as to be liable to a charge in favour of creditors. It must be separate property acquired *afterwards during coverture: ibid.*

(*n*) Altering the law as laid down in *Ex parte Jones, Re Grissell*, 12 Ch. D. 484.

The capacity to exercise a general power of appointment is not "separate property," and a married woman adjudicated bankrupt cannot be compelled to exercise such a power in favour of her trustee in bankruptcy: *Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D. 521; *Roper* v. *Doncaster*, 39 Ch. D. 482. Her liability is limited in respect of her "separate property."

But where real estate was vested in a trustee under a marriage settlement in trust for a married woman carrying on a separate trade during her life for her separate use without any restriction on anticipation, with remainder to such persons as she should whether covert or sole by deed or will appoint, with remainder in default of appointment, the life-interest of the married woman was held to pass to her trustee in bankruptcy under this sub-section: *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264 (Lord *Esher*, M. R. dissenting); In *Roper* v. *Doncaster, supra*, *Kay*, J., held that in cases not falling within this Act, whether the power of appointment be by deed or will, or by will only, an appointment by the

Married Women.

Property of a woman married after the Act to be held by her as a *feme sole*.

Sect. 2 (*o*) enables every woman marrying after the 1st of January, 1883, to hold as her separate property and dispose of by will or otherwise all real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage (*p*), including her separate earnings.

Loans by wife to husband.

Sect. 3 provides for the case of loans made by a wife to her husband (*q*).

Execution of general power.

Sect. 4. "The execution of a general power by will by a married woman (*r*) shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Property acquired after the Act, by woman married before, to be held by her as a *feme sole*.

Sect. 5 (*s*) is retrospective, and enables every woman married before 1st of January, 1883, to hold and dispose of in manner aforesaid as her separate property all real and personal property, her title (*t*) to which, whether vested or contingent, and whether

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will of a married woman does not make the property appointed liable to engagements entered into with her on the credit of her separate estate.

(*o*) This section is set out at length, *ante*, Vol. I. p. 225.

(*p*) See *infra*, s. 19, and covenant to settle after-acquired property.

(*q*) This section applies *only* to a loan for purposes connected with the trade or business of the husband, the words "*or otherwise*" referring to the immediately preceding words "carried on by him": *per Cave*, J., in *Re Tidswell*, 57 L. T. 416; 35 W. R. 669.

(*r*) An unexercised power of appointment may be the property of a man or *feme sole* within s. 44 of the Bankruptcy Act, 1883. But that Act is not to affect the provisions of this Act (s. 152).

Prior to this Act the Courts of Equity used to get at property which a married woman had power to appoint for her own benefit, to satisfy her creditors, either by treating contracts entered into by her as an imperfect exercise of the power, or by holding that the volunteers, her appointees, took the property appointed to them, subject to an equity in favour of the creditors of the appointor: *Tenney* v. *Andrews*, 6 Madd. 264. The distinction between a power of appointment given to a married woman and a trust for her separate use is shown in *Vaughan* v. *Vanderstegen*, 2 Drew. 165; see *Johnson* v. *Gallagher*, 3 De F. & J. 494—516; see also the judgment of *Fry*, L. J., in *Ex parte Gilchrist*, 17 Q. B. D. 521.

(*s*) This section is set out at length, *ante*, Vol. I. p. 226. See for restriction on this section, *post*, s. 19.

(*t*) It has now, after some fluctuation of judicial opinion, been held by the Court of Appeal that the accruer referred to is of *title* not *property*. In other words, property to fall within this section must be property the title to which, whether that *title* be vested,

Married Women.

in possession, reversion, or remainder, accrues after 1st of January, 1883, including her separate earnings.

As to stock, &c. to which a married woman is entitled.

Sect. 6 provides that certain specified investments standing on the 1st of January, 1883, in the sole name of a married woman shall *primâ facie* be deemed to be her separate property to which she is beneficially entitled, so as to entitle her to receive or transfer the same, and to receive the dividends, interest, and profits thereof without the concurrence of her husband.

As to stock, &c., to be transferred to a married woman.

By sect. 7, any of the same investments which, after the 1st of January, 1883, shall be allotted to or placed, registered, or transferred in or into the sole name of a married woman, shall *primâ facie* be deemed to be her separate property, in respect of which her separate estate shall alone be liable; and the section contains a proviso exempting any corporation or joint-stock company from the necessity of admitting a married woman as holder of shares or stock to which any liability may be incident if prohibited from so doing by Act of Parliament, or its rules and regulations.

Investments in joint names of married women and others.

Sect. 8 applies the provisions of the two preceding sections, so far as relates to the estate, right, title, or interest of the married woman, to any of the said investments standing in her name jointly with any person or persons other than her husband, and the husband is exempted from joining in the transfer of any of the said investments so standing in the name of his wife either alone or jointly with such other person or persons as aforesaid (sect. 9).

Fraudulent investments with money of husband.

Sect. 10 protects the husband in the event of any fraudulent investment by his wife out of his own monies, and further protects the creditors of the husband against any gift by him to his wife of any property which after such gift shall continue to be

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contingent, in possession, reversionary, or in remainder, accrues after the 1st January, 1883. See *Reid* v. *Reid*, 31 Ch. D. 402, overruling *Baynton* v. *Collins*, 27 Ch. D. 604; *Re Thompson* v *Curzon*, 29 Ch. D. 177, and affirming *Re Tucker*, *Emmanuel* v. *Parfitt*, 33 W. R. 932; 52 L. T. (N. S.) 23; *Re Adames' Trusts*, 33 W. R. 834; 52 L. T. (N. S.) 198.

Married Women.

in his order and disposition or reputed ownership, and against any investment or deposit of his monies by or in the name of his wife in fraud of his creditors, and authorises the following of such deposits or investments.

Monies payable under policy of assurance not to form part of estate of insured.

Sect. 11 (*u*) enables a married woman, by virtue of her contracting power, to effect a policy on her own or her husband's life for her separate use; and provides that a policy made by a man on his own life and expressed to be for the benefit of his wife or children, or wife and children, or any of them; or by a woman on her own life, and expressed to be for the benefit of her husband or children, or husband and children, or any of them, shall create a trust for the objects therein named; and also provides that the monies payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate or be subject to the debts of the insured, giving at the same time a right to the creditors of the insured to receive out of the policy monies a sum equal to the premiums paid, if the policy was effected and the premiums paid in order to defraud the creditors. The insured may by the policy on an insurance appoint trustees and make provision for the investment of the policy monies. If no trustee is appointed, the policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives in trust for

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(*u*) This section is almost identical with sect. 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), and would probably be construed in the same way: *per Chitty*, J., in *Re Adams' Policy Trusts*, 23 Ch. D. 525—530.

When, under sect. 10 of the former Act, a policy was effected by a husband on his life, which provided that under the provisions of the said Act "his said wife and the children of their marriage" should be entitled to receive the sum assured, *North*, J., held that, looking at the policy either by itself or jointly with the Married Women's Property Act, 1870 (s. 10), the wife and the children who survived the husband took as joint tenants: *Re Seyton, Seyton* v. *Satterthwaite*, 34 Ch. D. 511, differing from the view of *Chitty*, J., in *Re Adams' Policy*, *supra*, who was inclined to hold that the wife would take a life interest with remainder to her children.

This present section differs from sect. 10 of the earlier Act in that it contains the additional alternative "or of his children."

Married Women.

the purposes aforesaid. The section gives any Court having jurisdiction under the Trustee Act, 1850, power to appoint trustees, and provides that the receipts of trustees duly appointed, or in default of appointment or notice to the office, the receipt of the legal personal representative of the insured shall be a discharge to the office.

Remedies of married women for protection and security of separate property.

Sect. 12 gives every woman whether married before or after the Act, against all persons, including her husband (*x*), the same civil remedies and, with certain exceptions as regards her husband, the same remedies by way of criminal proceedings, for the protection of her own separate property as if it belonged to her as a *feme sole*.

Wife's ante-nuptial debts and liabilities.

By sect. 13, a woman after her marriage continues liable in respect and to the extent of her separate property for all ante-nuptial debts, contracts, or torts, and sums for which she may be liable as a contributory, and may be sued therefor; and any sums recovered against her and costs are made payable out of her separate property; and as between her and her husband in the absence of contract to the contrary, her separate property shall be deemed to be primarily liable. But the Act leaves unaffected the liability of any woman married before the 1st January, 1883, except as to any separate property to which she may become entitled by virtue of this Act alone (*y*): *London & Prov. Bank* v. *Bogle*, 7 Ch. D. 773; *Sanger* v. *Sanger*, 11 Eq. 470; and see note to sect. 19, *post*, p. 141.

(*x*) Before the Act a husband could sue his wife in respect of any contract binding her separate estate: *Wake* v. *Parker*, 2 Keen, 59; *Davis* v. *Prout*, 7 Beav. 288; *Earl* v. *Ferris*, 19 Beav. 67; *Brooke* v. *Brooke*, 27 L. J. Rep. (C. A.) 639; so now he may maintain an action against her and charge her separate estate for money lent by him to her after marriage, and for money paid by him for her after their marriage at her request made before or after their marriage: *Butler* v. *Butler*, 16 Q. B. D. 374; but not for loans made to or payments for her *before* their marriage at her request: *Butler* v. *Butler*, 14 Q. B. D. 831.

(*y*) This exception refers to property which by force of sect. 5 becomes her separate property, and *semble* does not affect property to which after her marriage she becomes entitled under a gift or bequest to her separate use.

Married Women.

Husband to be liable for his wife's ante-nuptial debts to a certain extent.

By sect. 14 a husband is rendered liable for his wife's ante-nuptial debts, contracts, torts, and liabilities to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through her, after deducting any payments made by him, and sums for which judgment may have been *bonâ fide* recovered against him in respect of such debts, &c. But again, the Act leaves unaffected the liability of any husband married before the Act for or in respect of any such debt or other liability of his wife.

Sects. 15, 16, 17, contain provisions regulating suits instituted in respect of such ante-nuptial liabilities —subjecting the wife to liability to criminal proceedings—and providing for the settlement in a summary way of questions between husband and wife as to the title to or possession of property (*z*).

Married woman as an executrix or trustee.

Sect. 18 enables a married woman who is an executrix or administratrix or trustee either alone or jointly with any other person or persons to sue or to be sued, and to transfer or join in transferring any of the investments specified in sect. 7 in that character without her husband, as if she were a *feme sole*.

Interpretation of terms.

This section is retrospective and must be read with sect. 24 (the interpretation section), under which "contract" includes the acceptance of any trust or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix, either before or after marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration (*a*).

(*z*) Under sect. 17, a married woman who had obtained a decree for judicial separation was held entitled to an inquiry by the Registrar, as to whether certain furniture claimed by her was her separate property: *Phillips* v. *Phillips*, 13 P. D. 220.

(*a*) The result of these sections seems to be to alter the previously existing law, under which the husband of an executrix,

Married Women.

Saving of existing

Sect. 19 (*b*). Nothing in this Act contained shall (*c*) interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman (*d*), or shall inter-

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administratrix, or trustee, was liable for the conduct of his wife in any such capacity, for her devastavit, and her breaches of trust passive or active: *Wainford* v. *Heyl*, L. R. 20 Eq. 321, 324; *Bahin* v. *Hughes*, 31 Ch. D. 390.

Compare sect. 6 of the Vendor and Purchaser Act, 1874, under which a married woman in whom any freehold or copyhold hereditaments are vested as a bare trustee, may convey or surrender the same as if she were a *feme sole*: see *Re Docwra*, 29 Ch. D. 693.

(*b*) This section is set out at length, *ante*, Vol. I. p. 226.

(*c*) "Interfere with or affect any settlement" means "invalidate or render inoperative any settlement." The Legislature draws a distinction between interfering with a settlement and affecting an estate created by the settlement: see *per Lindley*, L. J., in *In re Armstrong, Ex parte Boyd*, 21 Q. B. D. at p. 270; quoted by *Stirling*, J., in *Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622. In that case a fund was settled by a settlement in 1878, upon a former marriage of Mrs. P., in trust for her during her life, and during her said intended coverture for her separate use without power of anticipation, and after her death (in the event which had happened) upon trust for such persons as she should during coverture by will, and when not under coverture by deed or will appoint, and in default of appointment in trust for Mrs. P. herself. Mrs. P., having survived her former husband, married Col. P., after the Married Women's Property Act, 1882, without having exercised her power of appointment. No settlement was made upon this marriage. *Stirling*, J., said: "If she had come to the Court immediately before her marriage with Col. P., it is clear that she would have been entitled to have the trust fund transferred to her. That is shown by *Holloway* v. *Clarkson*, 2 Hare, 521; *Devall* v. *Dickens*, 9 Jur. 550;" and his Lordship held that, notwithstanding sect. 19, the Act applied, so as to add the incident of separate use to whatever Mrs. P. took under the settlement, and that consequently she and her husband were entitled to have the trust funds paid to them.

(*d*) Having regard to the saving contained in this section, property which by sect. 5 would be separate property of the wife, will not fall within the description of "property settled to the wife's separate use," so as to bring it within an exception of such last mentioned property, in a covenant in a settlement to settle after acquired property: *Re Stonor's Trusts*, 24 Ch. D. 195; *Christian* v. *Whitaker, Re Whitaker*, 34 Ch. D. 227; *Hancock* v. *Hancock*, 38 Ch. D. 78. These cases decide that sects. 5 and 19 are to be read together so as to prevent anything from being taken away by sect. 5 from the husband and children, which they would have had

Married Women.

settlements and the power to make future settlements.

fere with or render inoperative any restriction against anticipation, at present attached or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no such restriction contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity as against debts contracted by her before marriage (*e*), and no settle-

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under the settlement if sect. 5 had not taken it away: *per North*, J., *Hancock* v. *Hancock*, *ibid.* p. 86.

Where a married woman has been adjudicated bankrupt, separate property settled by her on herself by her marriage settlement, *but with no restraint on anticipation*, passes to her trustee in bankruptcy under sect. 1, sub-sect. 5, notwithstanding this section. So held by the majority of the Court (*Esher*, M.R., dissenting) in *In re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264. This section does not say that nothing in the Act shall interfere with or affect the incidents annexed by the Act to separate estate, or the consequences which follow its creation. Settlements creating separate estate are to have the same effect as if this Act had not passed: *per Lindley*, L.J., *ibid.* at p. 270. *Chitty*, J., held that the word "settlement" in this section means only such as are binding upon married women, and did not include a post-nuptial settlement made before the Act, which, so far as it purported to be made by the wife, was void: *In re Queade's Trusts*, 54 L. J. Rep. (Ch.) 786. "A settlement or agreement for settlement respecting the property of any married woman," should be read as a settlement or agreement which affects legally or equitably the property, and not merely one that concerns or relates to the property, *i.e.*, some settlement or agreement which has a binding force over the property: *per Chitty*, J., *ibid.* p. 790. But see *Hancock* v. *Hancock*, *supra*; and see *Re Armstrong, Ex parte Boyd*, *supra*, where *Lindley*, L.J., says that this section "applies to all settlements whether made before or after marriage, and is not confined to what are popularly called marriage settlements."

(*e*) Under the former Act, 1870, sect. 12, where a woman being indebted, had settled her property before marriage to her separate use, without power of anticipation; there, notwithstanding the restraint on anticipation, it was held that the liability for her antenuptial debts could be enforced against her separate estate: *London and Provincial Bank* v. *Bogle*, L. R. 7 Ch. D. 773; and see *Sanger* v. *Sanger*, L. R. 11 Eq. 470. For form of judgment against married women with separate property, see *Scott* v. *Morley*, 20 Q. B. D. 120, set out *ante*, p. 134. And having regard to the personal liability which attaches, under 11 Geo. 4, and 1 Wm. 4, c. 47, ss. 6, 8, to an heir or de-

ment or agreement for a settlement (*f*) shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors. Married Women.

Sect. 20 makes a married woman with separate property liable to the parish for the maintenance of her husband out of such property; and sect. 21 subjects her to the liability of maintaining her children and grandchildren to the same extent as before the Act the husband was liable; but nothing in this Act is to relieve the husband from any legal liability of maintaining her children or grandchildren.

Married woman to be liable to parish for the maintenance of her husband; her children and grandchildren.

Disability of Infancy.]—The principal disability, rendering persons incompetent to make settlements, is that of infancy. Though the law allows infants to contract marriage it does not incidentally invest them with the power of disposing of their property so as to provide for the objects, actual or potential, of this institution. The incapacity of infants to make settlements on marriage has been partially removed by the Infants Settlement Act, 1855 (18 & 19 Vict. c. 43), the provisions of which will be considered later: see *post*, p. 152. The subject

Disability of infancy.

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visee of real estate who has aliened such real estate to the discharge of the unpaid debts of his ancestor or testator (as the case may be), where a woman, an heiress or devisee, conveys the descended or devised estates to trustees, in contemplation of marriage, upon trust for herself until marriage, and after the marriage for herself for life for her separate use, without power of anticipation, the married woman becomes personally liable by the alienation effected by her settlement, to the extent of the value of the settled lands, for such of the debts of her ancestor or testator as his personal and other real estate may be unable to meet; and that under sect. 12 of the Act of 1870 that liability can be enforced against her life estate under the settlement, notwithstanding the restraint: *Small* v. *Hedgely*, 34 Ch. D. 379.

(*f*) The word "such" is not used, and it might be urged that this part of the section is retrospective; but it has been held by a Divisional Court that the whole of the latter part of the section refers only to settlements made after the Act: *Beckett* v. *Tasker*, L. R. 19 Q. B. D. 7, 11, 12.

Disability of Infancy.

of the disability of infancy as regards settlements will first be considered independently of this Act.

Where both parties are infants.

Where the intended husband and wife are both under full age, no binding settlement of their respective property can be made. The Court of Chancery never had, nor has now the Chancery Division of the High Court jurisdiction to compel an infant, although a ward of Court, to make a settlement of his or her property: *Field* v. *Moore*, 7 De G. M. & G. 691; *Blood* v. *Branfill*, cit. ibid. 711; *Johnson* v. *Johnson*, 1 Keen, 648; *Re Murray*, 3 Dr. & W. 83, and *Re Leigh, Leigh* v. *Leigh*, 40 Ch. D. 290 (cases of a male infant); *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21, affirmed in Dom. Proc. sub. nom., *Seaton* v. *Seaton*, 13 App. Ca. 61.

Male infant.

The settlement by a male infant, upon his marriage with an adult, either of his real (*g*) or personal estate, independently of any question of election, will not bind his estate. So, too, an ante-nuptial agreement by him to settle his wife's property, not already settled to her separate use, being (prior to the Married Women's Property Act, 1882) prejudicial to the interests of the infant, was held to be absolutely void as against him: *Kingsman* v. *Kingsman*, 6 Q. B. D. 122; *Trowell* v. *Shenton*, 8 Ch. D. 318. In the case of *Slocombe* v. *Glubb*, 2 Br. C. C. 545, Lord *Thurlow*, C., held that an infant husband was bound by a covenant of his adult wife, on the occasion of their marriage, to settle her real property upon uses under which the husband, if he should survive her, took an express life estate; but he declined to discuss the question how far the husband could be bound by his own contract. And Lord *Selborne*, C., in *Kingsman* v. *Kingsman*, 6 Q. B. D. at p. 125, explained the decision in that case on the ground that the husband having taken the benefit of the settlement could not reject it in part, and accept it in part.

Female infant.

The case next to be considered, upon which ques-

(*g*) See *Caruthers* v. *Caruthers*, 4 Br. C. C. 500, 510; *Honywood* v. *Honywood*, 20 Beav. 451.

tions have most often arisen, is that of a female infant marrying an adult. Disability of Infancy.

A settlement of a female infant's personal estate in possession was (prior to the Married Women's Property Act, 1882) binding upon her because the property vesting in the husband by the act of marriage, the settlement was treated as that of the husband, and bound him accordingly: *Simson* v. *Jones*, 2 Russ. & My. 365, 374. But a settlement of her choses in action or of her reversionary interests, not reduced into, or becoming interests in possession during the coverture, was not binding upon her so as to defeat her right by survivorship, inasmuch as neither class of property became absolutely vested in the husband by force of the marriage: *Field* v. *Moore*, 7 De G. M. & G. 691, 714. If, however, these interests were, during the coverture, reduced into, or became interests in possession, then the property, becoming the husband's, became, as in the former case, bound by the settlement.

On the other hand, it was held by Sir *J. Leach* in *Trollope* v. *Linton*, 1 S. & St. 477, that articles of settlement by a female infant, though not followed up by a settlement, of her chattels real to which she was entitled, were binding upon her so as to defeat her right to survivorship.

A settlement by a female infant of her real estate was not binding upon her, for she could not contract, nor could her parents or guardians contract in her behalf, so as to bind her real estate: *Salsbury* v. *Bagott*, 2 Swanst. 603; and the husband took no absolute interest in it, but only the limited right to the receipt of the rents and profits during the coverture, and the possible tenancy by the curtesy after her death. But as the husband was held to be precluded from doing anything during the coverture to defeat or to aid his wife in defeating the settlement (*Milner* v. *Lord Harewood*, 18 Ves. 259; *Durnford* v. *Lane*, 1 Br. C. C. 106; and see *Sharpe* v. *Foy*, L. R. 4 Ch. 35), and as the wife was unable during that period to deal with her real estate without the husband's concurrence, the result would be that, during the coverture, the settled real estate Real estate.

Disability of Infancy.

would be secured according to the provisions of the settlement.

Property already given to her separate use.

For the same reason that the husband took no interest, a settlement of property settled to her separate use was not binding upon her.

But a female infant could, by contract on marriage, deprive herself of her right of dower by accepting a jointure (*h*) or some provision substantially equivalent to a jointure, provided only that the substituted provision was as certain as the dower: *Caruthers* v. *Caruthers*, 4 Br. C. C. 500, 513.

Infant's settlement not binding by reason of competent settlement by third party, &c.

At one time a notion seems to have prevailed that equity could enforce contracts of infants respecting their property, entered into in contemplation of marriage, in cases where such contracts were made in consideration of a competent settlement: *Cannel* v. *Buckle*, 2 P. Wms. 244; or were made with the approbation of parents and guardians: *Harvey* v. *Ashley*, 3 Atk. 607; or with the sanction of the Court of Chancery: *Earl of Bucks* v. *Drury*, 2 Eden, 69. But the unsoundness of these decisions has now been placed beyond controversy by numerous modern cases, and it is now well established that settlements or agreements for settlements made by infants are not enforceable, in any case, either against the infants themselves when they come of age, or against any persons claiming under them, notwithstanding that a third person may have made a competent settlement in favour of the infants: *Durnford* v. *Lane*, 1 Br. C. C. 106; or notwithstanding that the parents or guardians of the infants may have approved of and concurred in the settlement: *Pearson* v. *Pearson*, 1 Br. C. C. 113 n.; *Clough* v. *Clough*, 3 Woodes, 453 n.; 5 Ves. 717. And the fact that a settlement has been made under the direction of, or approved by the Court, will not (except in cases coming under the Infants' Settlement Act) make an infant's disposition or covenant binding

(*h*) This is apparently by force of the stat. 27 Hen. 8, c. 10. See *Earl of Bucks* v. *Drury*, 2 Ed. 39, 60 (see that case mentioned in *Seaton* v. *Seaton*, 13 App. Cas. at p. 67); *Glover* v. *Bates*, 1 Atk. 439; *Simson* v. *Jones*, 2 R. & My. 377.

Disability of Infancy.

upon him or her, or make the infant liable to give effect to it on attaining full age: *Hastings* v. *Orde*, 11 Sim. 205; *Simson* v. *Jones*, 2 Russ. & My. 365; *Martin* v. *Martin*, ibid. 507; see also *Field* v. *Moore*, 7 De G. M. & G. 691; *Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439.

Doctrine of election.

An infant is not, however, any more than any other person, to be allowed to avoid the performance of an instrument, and at the same time to take advantage of the provisions and benefits thereof. By the well established doctrine of election, an infant must, on cesser of the disability, decide to take either under or against a settlement made by him or her during infancy; and if he or she, by claiming the property under a title paramount to the deed, withdraws part of the consideration for which the settlement was intended to be made, such infant must give up by way of compensation the interest to which he or she would have been entitled under the deed: *per* Lord *Selborne*, C., in *Codrington* v. *Lindsay*, L. R. 8 Ch. at p. 587 (*S. C.* affirmed in Dom. Proc. sub nom. *Codrington* v. *Codrington*, L. R. 7 H. L. 854); see *Cahill* v. *Cahill*, 8 App. Ca. 420 (*i*). Thus, the settlement of an infant, though, strictly speaking, not binding on such infant, may be of much practical utility; for if some other party to the settlement, who is bound thereby, has settled any property in which the infant is to take an interest, the infant must, in order to entitle him to the benefit of such interest, accept the settlement, and consequently bring within its provisions the property intended to be settled, but which was not actually bound by the settlement.

Female infant taking *inalienable* life interest

But, as the principle underlying the doctrine of

(*i*) The application of the rule of election is illustrated, as regards cases of contract for valuable consideration resting on articles, by *Savill* v. *Savill*, 2 Coll. 721, and *Brown* v. *Brown*, L. R. 2 Eq. 481; as regards contracts for value completely executed by conveyance or assignment, by *Green* v. *Green*, 2 Mer. 86, and *Willoughby* v. *Middleton*, 2 J. & H. 344; and as regards voluntary deeds by *Llewellyn* v. *Mackworth*, Barn. 445, and *Anderson* v. *Abbott*, 23 Beav. 457.

Disability of Infancy.

under a settlement not bound to elect by reason of a covenant to settle after-acquired property.

election is the obligation imposed upon the party seeking to defeat the settlement to make compensation out of the interest derived through and under the settlement, it is a condition precedent that the infant should, on attaining full age, be competent to give up by way of compensation the provision intended for him or her under the settlement. It has, accordingly, been held in a recent case by the Court of Appeal (definitely settling a question upon which former decisions were ambiguous or conflicting), that where, upon the marriage of a female infant, a settlement was executed giving her a life interest in the settled fund for her separate use, with a restraint on anticipation, and containing a covenant by her to settle her after-acquired property, and after the marriage property was bequeathed to her for her separate use, she was entitled to hold the bequest unaffected by the settlement, and at the same time to retain her life interest under the settlement: *Re Vardon's Trusts*, 31 Ch. D. 275.

The Court there laid down that the presumption on which the doctrine of election rests, viz., the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, might be repelled by a declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention; and, acting on that principle, the Court treated the restraint on anticipation contained in the settlement as of itself amounting to a declaration that the infant was not to be put to her election; for if she elected to take against the settlement, and by such election deprived herself of the right to receive future payment of the income of the settled fund, until her husband and children were compensated, she would be in effect anticipating the income, which was inconsistent with the provisions of the settlement. See also *Smith* v. *Lucas*, 18 Ch. D. 531; *Re Wheatley, Smith* v. *Spence*, 27 Ch. D. 606; *Re Queade's Trusts*, 53 L. T. 74; 33 W. R. 816.

Confirmation of settlements.

An ante-nuptial settlement by an infant, being not void but only voidable, is capable of confirmation when the disability of infancy has ceased: *Zouch* v.

Disability of Infancy.

Parsons, 3 Burr, 1794 (*k*); and the settlement, until avoided, is binding; "a covenant by an infant, assuming it may be for his benefit, is, till it is avoided, a binding covenant:" *per Jessel*, M.R., in *Smith* v. *Lucas*, 18 Ch. D. at p. 543; see also *Willoughby* v. *Middleton*, 2 J. & H. 344. Whether there has been confirmation is a question of fact in each particular case. Any act which manifests a deliberate intention of a person, after attaining full age, to recognise a settlement made in infancy, amounts to an election to confirm it: *Wilder* v. *Pigott*, 22 Ch. D. 263. Where, however, an infant in contemplation of marriage wrote to his intended wife promising to settle certain house property, when he should come of age, and after the marriage he, being of full age, executed a settlement not referring to the letter but dealing with other property than that mentioned therein, and settled the property in a different way, it was held by the Court of Appeal (reversing the decision of *Hall*, V.-C.), that there was no confirmation of the promise, and that the settlement was consequently voluntary and void as against a purchaser for value from the husband: *Trowell* v. *Shenton*, 8 Ch. D. 318. The effect of a confirmation is that the settlement becomes as binding in equity as it would have been if originally made by a person not under disability. There can, of course, be no confirmation of a settlement which is void *ab initio*: *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21, affirmed in Dom. Proc. sub nom. *Seaton* v. *Seaton*, 13 App. Ca. 61.

Confirmation by female infants.

As regards a female infant (independently of the Married Women's Property Act, 1882), there are two disabilities to be taken into consideration, namely, infancy and coverture (*k*). So far as the disability of infancy is concerned, a married woman can, during coverture, elect to confirm a settlement made by her when an infant: *Barrow* v. *Barrow*, 4 K. & J. 409; *Smith* v. *Lucas*, 18 Ch. D. 531; *Wilder* v. *Pigott*, 22 Ch. D. 263. The confirmation

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(*k*) The confirmation by an infant of his or her marriage settlement does not seem to be in any way affected by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), sect. 2.

Infants' Relief Act.

Disability of Infancy.

may be effected either expressly by deed; or by acts referable to the settlement, such as the exercise of a power of appointment given to her by the settlement: *Burnaby* v. *Equitable Reversionary Interest Soc.*, 28 Ch. D. 416. But having regard to the continuing disability of coverture, the deed of confirmation must be such as a married woman can execute, and, where so required, a deed duly acknowledged: *Field* v. *Moore*, 7 De G. M. & G. 691; *Campbell* v. *Ingilby*, 21 Beav. 567. And a married woman cannot, during coverture, by executing a deed confirmatory of a settlement made during infancy, bind herself as regards property of which, at the date of the deed of confirmation, she is, as a married woman, unable to dispose. So a deed executed by a married woman purporting to confirm a settlement made by her in infancy, which contained a covenant to settle all her after-acquired property, was held not to bind her as regards property not acquired by her at the date of the confirmation: *Smith* v. *Lucas*, 18 Ch. D. 545; *Burnaby* v. *Equitable Reversionary Interest Soc.*, 28 Ch. D. 416.

Confirmation by widow.

Where a female infant executed an antenuptial settlement of two reversionary funds to which she was entitled on the death of her mother; and, *after her husband's death*, one of the funds by the release of the mother's life interest therein, fell into possession, and was by the widow's direction paid to the trustees of the settlement; it was held that she had confirmed the settlement *in toto*, so that the other reversionary fund, which did not fall into possession until the widow became of unsound mind, was held also to be bound by the settlement: *Davies* v. *Davies*, L. R. 9 Eq. 468; see *Merryweather* v. *Jones*, 4 Giff. 509; *Allen* v. *Allen*, 2 Dr. & W. 307; *White* v. *Cox*, 2 Ch. D. 387.

Married woman's property in Court.

The settled property, if consisting of a fund in Court, will not be transferred to the trustees of the settlement, without the consent of the wife on attaining her majority: *Day* v. *Day*, 11 Beav. 35.

Election on behalf of lunatic not so found.

The Court has the power of electing on behalf of a married woman who is a lunatic, but not so

found by inquisition: *Wilder* v. *Pigott*, 22 Ch. D. 263.

Disability of Infancy.

Under Lord Tenterden's Act (9 Geo. 4 c. 14), sect. 5, a contract made by an infant must be ratified by some writing signed by the party chargeable, "The ratification may be by express reference to the agreement, or by implication, but the ratification must appear on the face of the writing": per *Jessel*, M.R., in *Trowell* v. *Seaton*, 8 Ch. D. at p. 324.

Writing necessary to confirmation.

Since the passing of the Married Women's Property Act, 1882 (*l*), it would seem that no settlement by a female infant, apart from the Infants' Settlement Act, will be binding upon her, except through the doctrine of election, or by confirmation. For, as all property of a married woman, real or personal, in possession or reversionary, whether existing at the time of or acquired subsequently to and during the marriage, now belongs absolutely to her, it will be no longer possible to treat any settlement by her, even of her existing personal property, as in fact a settlement by her husband, and enforceable against him; and the security that formerly attached to a settlement by a female infant of her real property, by reason of her inability to dispose of it during her coverture without the concurrence of her husband, who, as has been before stated, was precluded from defeating such a settlement, no longer exists.

Effect of Married Women's Property Act, 1882.

On the other hand, the ample capacity now enjoyed by a married woman of contracting and disposing of her property of whatever nature has greatly facilitated the confirmation by her of the settlement during her coverture. And since the Act, as before, she will (subject, however, to the restraint on anticipation) be unable to defeat a settlement under which she takes a benefit from the husband or other person without compensating the persons who have been disappointed by her election to disaffirm the settlement.

Extended power of confirmation.

To obviate the difficulty arising from the inca-

Infants' Settlement Act.

(*l*) See as to payment of husband's costs of the settlement since the Act, *De Stacpoole* v. *De Stacpoole*, 37 Ch. D. 139.

Disability of Infancy.

pacity of infants to make binding settlements on marriage, the Infants' Settlement Act (18 & 19 Vict. c. 43) was passed. This Act (which was extended to Ireland by the 23 & 24 Vict. c. 83) enables any male infant over twenty years of age, and any female infant over seventeen years of age (see sect. 4), upon or in contemplation of marriage, with the sanction of the Court of Chancery (now the Chancery Division of the High Court of Justice) to settle the whole or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment or assignment thereof, executed by such infant with the approbation of the Court, for the purpose of giving effect to such settlement, is to be as valid and effectual as if the person executing the same were of full age; but this enactment is not to extend to powers which the infant is expressly prohibited from exercising: sect. 1.

By sect. 2, the death of an infant tenant in tail under twenty-one years of age avoids any appointment or disentailing assurance executed under the Act.

By sect. 3, the sanction of the Court is to be given upon petition by the infant or guardian; and if there is no guardian the Court may require one to be appointed; and may order persons interested to be served with notice of the petition.

"Upon or in contemplation of marriage."

In the case of *Re Sampson & Wall*, L. R. 25 Ch. D. 482 (*m*), it was held by the Court of Appeal that the word "or" in the phrase "upon or in contemplation of marriage" is to be read in its ordinary disjunctive sense; and that, consequently, an infant, whether male or female, may make a settlement under the Act, upon the occasion of, although subsequently to, the marriage (*n*). In the same cases

Act has no

(*m*) See too, *Powell* v. *Oakley*, 34 Beav. 575.

(*n*) In *Seaton* v. *Seaton*, 13 App. Cas. 61, the House of Lords refused to decide whether the Act had the application here given

Disability of Infancy.

special reference to wards of Court.

Lord *Selborne* defined "upon marriage" as meaning "on the occasion of marriage," and pointed out that the Act has no special reference to wards of Court, or to contempts of Court, but includes the case of a marriage improvidently contracted between two infants, or an infant and an adult, before or without a settlement. It appears consequently, notwithstanding *Re Potter*, L. R. 7 Eq. 484, that the Court has power to make a post-nuptial settlement under the Act, even where the infant is not a ward of Court. And in a more recent case *Chitty*, J., held that the Act enabled a settlement to be made, in the case of a female infant (not a ward of Court) who had married under seventeen, on her attaining that age. His Lordship held that the true construction of sect. 4 of the Act was that, although until the age there mentioned no benefit can be obtained from the Act, yet the incapacity to make a settlement ceases after the attainment of that age, and that then a settlement—if really a settlement upon the occasion and in consequence of the marriage, and considered by the Court to be desirable—may be made: *Re Phillips*, 34 Ch. D. 467. In this case the marriage had taken place at a registrar's office on the 11th March, 1886, been re-solemnised in church on the 28th March, and on the 5th February, 1887, the order directing a settlement was made upon the petition of husband and wife. But from the decision of the Court of Appeal in the later case of *Re Leigh, Leigh* v. *Leigh*, it would seem that this decision could not be supported, on the ground that, even assuming that the words "on marriage" were to be treated as tantamount to "on the occasion of marriage," the settlement could not, having regard to the length of the interval between the date of its execution and of the solemnisation of the marriage be properly described as made on the "occasion of the marriage."

An application under the Act does not make the

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to it; and see *Re Leigh, Leigh* v. *Leigh*, 40 Ch.D. 290, where the Court expressed doubts as to the correctness of this holding.

Disability of Infancy.

infant a ward of Court, and consequently the Court has not to consider the propriety of the marriage but the fitness of the settlement: *Re Dalton*, 3 Sm. & G. 331; 6 De G. M. & G. 201; *Re Strong*, 2 Jur. (N. S.) 1241; but the practice seems to be to approve of the marriage as well as of the settlement (*o*).

Position of Court in approving settlement.

The Court, in approving of settlements under the Act, or for its wards, will place itself in the position of a parent, and will approve of any settlement which a prudent father would consider reasonable: *Martin* v. *Foster*, 7 De G. M. & G. at p. 102; and will direct the insertion of such provisions as would be usually inserted in a settlement.

Exercise by infant of power collateral—valid;

With reference to the proviso at the end of sect. 1, it may be here observed that the exercise by an infant of a power which is simply collateral, *i.e.*, a power given to a person who has no interest whatever in the property given, *e.g.*, a power of sale and exchange to trustees having no estate in the lands—is valid both as to real and personal estate. A

in gross—valid as to personal estate, invalid as to real estate;

power in gross, *i.e.*, a power given to a person who has an interest in the property over which the power extends, but which interest cannot be affected by the exercise of the power, *e.g.*, the power of a tenant for life to appoint the property after his death, or to jointure, may be exercised by an infant over personal estate, but not over real estate: *Hearle* v. *Greenbank*, 3 Atk. 695; *Re Cardross's Settlement*, 7 Ch. D. 728. A power appendant or appurtenant,

appendant or appurtenant—invalid.

i.e., a power exerciseable by a person who has an interest in the property, which can be affected by the exercise of the power, *e.g.*, a power of leasing possession in the tenant for life—is not exerciseable by an infant.

Re D'Angibau.

Where, on the marriage of a female infant, a settlement was executed in which it was agreed that certain trust funds in which the infant took an interest on her marriage, subject to an annuity for

(*o*) See Simpson on the Law of Infants, p. 312, where the regulations prescribed as to the evidence to be produced on the application, and the course of procedure are given.

Disability of Infancy.

her mother's life, should be assigned to the trustees upon the usual trusts for the benefit of the wife and husband and issue of the marriage, and in default of such issue upon trust for such person or persons and for such purposes as the wife should by deed or will appoint, and in default of and subject to such appointment upon trust, if the husband survived the wife, which event happened, for her statutory next of kin, exclusive of her husband, and the wife died an infant without issue, having by deed appointed the trust funds in favour of her husband absolutely, the Court of Appeal held, affirming the decision of *Jessel*, M.R. (but dissentient *Cotton*, L. J.), that the appointment by the wife while still a minor was a good appointment: *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 228.

Act does not remove disabilities other than infancy.

It has been decided in the recent case of *Buckmaster* v. *Buckmaster* (35 Ch. D. 21, affirmed in House of Lords, sub nom. *Seaton* v. *Seaton*, 12 App. Cas. 61), that this Act only removed the disability of infancy, leaving unaffected other disabilities such as lunacy or coverture. In that case a female infant (a ward of Court) executed shortly after her marriage, under the direction of the Court, a post-nuptial settlement, purporting to assign a reversionary interest in personalty (not falling within Malins' Act, 20 & 21 Vict. c. 57), and this interest did not fall into possession till after the determination of the coverture, the settlement was, as to that reversionary interest, held to be altogether inoperative, for as an adult married woman could not have assigned such an interest, the Act did not enlarge her capacity as a married woman because she was also an infant.

In *Re Sampson & Wall*, 25 Ch. D. 482, the property settled by the infant was of such a nature as a married woman was legally capable of conveying, belonging as it did to her for her separate use: see *per Kay*, J. at p. 488.

Act does not increase jurisdiction of Court to compel infant to execute

The Act does not extend the jurisdiction of the Court so as to enable it to compel an infant, whether ward of Court or not, to execute a settlement of his or her property: *Seaton* v. *Seaton*, 13 App. Cas. 61;

Disability of Infancy.

settlement of his or her property.

Costs.

Re Leigh, Leigh v. *Leigh,* 40 Ch. D. 290; and see *ante,* p. 144.

The costs of and incidental to the preparation of the settlement, including the costs of the husband, have been ordered to be paid out of the female ward's property, where the husband had married without the leave of the Court, but in ignorance of the fact that the infant was a ward, and when he had no property of his own: *Anon.,* 4 Russ. 473; and a similar order was made in *De Stacpoole* v. *De Stacpoole,* 37 Ch. D. 139.

But as a general rule the costs of the preparation of the marriage settlement are borne by the husband, and solicitors who were employed by an intending husband to prepare a setlement were held entitled to retain the settlement until their costs had been paid: *Re Gregson,* 26 Beav. 87.

Jurisdiction of the Court over its wards.

The Chancery Division of the High Court of Justice has succeeded to the long established jurisdiction of the Court of Chancery over the persons and property of its wards; and this jurisdiction has frequently been effectually exercised so as to cause settlements of such property to be made. The consent of the Court is requisite to the marriage of a ward, whether male or female, and notwithstanding that there is a parent or guardian: see Dan. Ch. Pr. 1131. And compliance with this requirement may be enforced by judgments against the parties concerned followed by committal for contempt in case of disobedience, or if the parties were already married without consent by the committal and detention of the offenders or one of them: *Bathurst* v. *Murray,* 8 Ves. 74; *Field* v. *Brown,* 17 Beav. 146. The Court will not give its consent to the marriage until a proper settlement of its ward's property has been executed: *Hodgens* v. *Hodgens,* 4 Cl. & F. 323. And where a man has married a female ward of Court without previously obtaining its consent, even though he has done so in ignorance that she was a ward of Court, he may be committed to prison for the contempt, and detained there until a proper settlement has been approved and executed: *Stacpoole* v. *Beaumont,* 3 Ves. 89; *Millet* v. *Rowse,*

7 Ves. 419; *Cox* v. *Bennet*, 22 W. R. 819; *Re Sampson and Wall*, 25 Ch. D. 482. Disability of Infancy.

Where the property of the ward is a fund in Court, that circumstance gives to the Court a control over the property itself, which may be exercised so as practically to compel the execution of a proper settlement. In *Martin* v. *Foster*, 7 De G. M. & G. 98, *Knight-Bruce*, L. J., said (at p. 101): "The case may stand thus,—that it may not be in the power of the Court or correct to enforce a settlement against the wishes both of the wife and husband. That is a point upon which at present I decline to give any opinion; but the Court clearly has this jurisdiction, viz., to decline parting with the capital of a fund within its own power and custody, belonging to the wife, even upon the application of both, and the consent of the wife in Court during their joint lives, until such a settlement shall be made as the Court may think advisable and proper under the circumstances." And *Turner*, L. J., said in the same case (at p. 102): "The Court exercises its discretion whether it will make the payment or not. In exercising this discretion the Court, as I apprehend, is guided by the consideration of what is most for the benefit of the wife and children, and as a general rule I take it the Court will give its sanction to any arrangement which a prudent father could approve of." In two cases *Shadwell*, V.-C., on the joint application of the husband and wife, who had attained full age, ordered a fund in Court to be paid to the husband without requiring a settlement to be made: *Leeds* v. *Barnardiston*, 4 Sim. 538; *Bennett* v. *Biddles*, 10 Jur. 534. But these decisions may be regarded as overruled by the decision in *Martin* v. *Foster*, *supra*; see the observations of *Stuart*, V.-C., in *Gynn* v. *Gilbard*, 1 Dr. & Sm. 356.

The jurisdiction of the Court over its wards is not ousted by lapse of time: *Ball* v. *Coutts*, 1 V. & B. 292; see *Cave* v. *Cave*, 15 Beav. 227. Nor can the jurisdiction be evaded by putting off till a female ward has attained full age a marriage which has been arranged while she was an infant: *Biddles* v. *Jackson*, 26 Beav. 282; 3 De G. & J. 544; see also Duration of jurisdiction.

Disability of Infancy.

Austen v. *Halsey*, 2 S. & St. 123; *Hobson* v. *Ferraby*, 2 Coll. 412; *Money* v. *Money*, 3 Drew. 256.

Effect of the Married Women's Property Act as regards the settlement of property of wards of Court.

It is to be borne in mind that as regards the marriage of a female ward without the consent of the Court, the position of the husband is materially altered by the operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). Formerly a husband acquired rights over the wife's realty and chattels real during the marriage, and his concurrence was necessary to dispose of such property; and by virtue of the marriage he became absolutely entitled to such of the wife's chattels personal and choses in action as he could reduce into possession during the coverture. The Court therefore, by detaining a husband until a proper settlement should have been executed, was able to bring pressure directly upon him, inasmuch as the settlement was in part or altogether his settlement. But in the case of such a marriage taking place since 1882, the sole purpose and effect of a committal and detention of the husband would seem to be to punish him for the contempt of Court which he has committed, and to deter others from doing the like. The Court cannot compel a ward to settle property: *Field* v. *Moore*, 19 Beav. 176; 7 De G. M. & G. 691; see *Martin* v. *Martin*, 2 Russ. & M. 507; the decision to the contrary in *Re Sampson and Wall*, 25 Ch. D. 482, was clearly in excess of the jurisdiction of the Court, and must be regarded as overruled on this point by *Buckmaster* v. *Buckmaster* 35 Ch. D. 21, affirmed in Dom. Proc. sub nom. *Seaton* v. *Seaton*, 12 App. Ca. 61; see also *Re Leigh, Leigh* v. *Leigh*, 40 Ch. D. 290. The husband himself has no power of disposal over the wife's personalty, except as regards his contingent interest therein, he has also no estate or interest in her realty, except his contingent right by the curtesy (as to which see *post*, pp. 361 *et seq.*); if he should survive his wife, and the next of kin of the wife have not hitherto been mainly the objects of the Court's solicitude; he is, therefore, incapable of purging his contempt by settling or agreeing to settle the property except to the extent of that contingent interest. If the wife remains obdurate it would seem

Disability of Infancy.

that nothing can be done. And it seems very doubtful whether it would be of any use to try to bring indirect pressure on her by making the release of her husband conditional on her consenting to settle her property. Being an infant, she cannot settle it independently of the Infants' Settlement Act; and it is conceived that the provisions of that Act could hardly be deemed to apply, where the wife at the time of the marriage refuses, and for some time after the marriage continues to refuse to make a settlement, but ultimately after an interval of weeks, or perhaps months (see *Re Leigh*, *Leigh* v. *Leigh*, *ubi sup.*) consents to do so under pressure: see *ante*, p. 153.

On the other hand the wife, when she attains full age, can now, under the Married Women's Property Act, 1882, make a post-nuptial and voluntary settlement of her property, if she should think proper, without her husband's concurrence. See as to such settlements, *post*, pp. 188 *et seq.*

Disability of lunacy, &c.

Disability of Lunacy.]—A lunatic or idiot is generally incompetent to convey property (see *ante*, Vol. IV., pp. 73 *et seq.*), or to bind himself by contract: 1 Steph. Comm. 474; 2 ibid. 61. And consequently such persons cannot bind themselves by a settlement or agreement for a settlement: *Manning* v. *Gill*, L. R. 13 Eq. 485. But it seems that dealings by a person apparently sane, though subsequently found insane, or by such person during a lucid interval, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding: *Molton* v. *Camroux*, 4 Exch. 17; *Elliott* v. *Ince*, 7 De G. M. & G. at p. 488; *Drew* v. *Nunn*, 4 Q. B. D. 661.

Property, &c., of bankrupt vests in trustee.

Disability of Bankruptcy.]—An undischarged bankrupt has no property which he is capable of settling, or agreeing to settle, or otherwise disposing of. By sect. 20 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), it is enacted that upon an adjudication of bankruptcy the property of the bankrupt becomes divisible among his creditors and vests in a trustee.

Disability of Bankruptcy.

By sect. 44 of the same Act (set out fully sub tit. COMPOSITION, *ante*, Vol. II. pp. 446, 447), such property is not to comprise property held by the bankrupt in trust for any other person, nor his tools, necessary wearing apparel or bedding; but it is to comprise the following particulars:—

(i.) "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him before his discharge; and

(ii.) "The capacity to exercise and to take proceedings for exercising all such powers in, or over, or in respect of property, as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy, or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and

(iii.) "Goods in the possession, order, or disposition of the bankrupt."

Relation back of trustee's title.

It is to be borne in mind that the bankruptcy, and the trustee's title thereunder, relate back to and commence at the time of the act of bankruptcy on which the receiving order is made, or of the first act of bankruptcy (if more than one) committed by the debtor within three months next preceding the date of the presentation of the bankruptcy petition. So that a settlement made by a person against whom no bankruptcy proceedings are pending is liable to be avoided by a receiving order made upon a petition presented within three months from the date of the settlement: see sect. 43 of the Act, set out fully *ante*, Vol. II. p. 445.

Protection of settlements for valuable consideration.

The avoidance of voluntary settlements will be considered later. Sect. 49 of the Act, however, expressly protects "any conveyance or assignment by the bankrupt for valuable consideration," and "any contract, dealing, or transaction by or with the bankrupt for valuable consideration," provided that it takes place before the date of the receiving order, and that the other party thereto had not at the time of the conveyance, &c., notice of an available act of bankruptcy committed before that time: see *ante*, Vol. II. pp. 453, 454.

As to exercise of powers by bankrupt.

As a general rule a bankrupt will not be allowed to exercise powers exerciseable for the benefit of

Disability of Felony.

other persons, if the creditors would be prejudiced thereby: *Badham* v. *Mee*, 7 Bing. 695; *Hole* v. *Escott*, 2 Keen, 444. But if property is settled on a man for life, or till bankruptcy, with remainder to his children as he shall appoint, he will be capable of exercising the power notwithstanding the bankruptcy, unless the instrument creating the power otherwise directs: *Parsons* v. *Parsons*, 9 Mod. 464; *Wickham* v. *Wing*, 2 H. & M. 436; *Haswell* v. *Haswell*, 2 De G. F. & J. 456; *Re Aylwin's Trusts*, L. R. 16 Eq. 585.

Disability of felons, &c.

As to Felons, &c.]—Felons and traitors formerly absolutely lost their property by escheat or forfeiture. And now by the Naturalization Act, stat. 33 Vict. c. 23, whereby escheat and forfeiture are abolished (see sect. 2), persons against whom judgment of death or of penal servitude has been pronounced are generally rendered incapable till death, bankruptcy, completion of punishment or pardon, of alienating or charging their property, or of making any contract; and are consequently incapable of settling, or agreeing to settle property.

Aliens.

As to Aliens.]—At common law an alien could not hold land by a secure title, as the Crown could at any time claim the property; and any settlement of land so held by an alien, though in other respects valid, would be subject to the right of the Crown to enter: see Co. Litt. 2 b; Shep. Touchst. 232; *R.* v. *Holland*, Aleyn, 14. The disability might, however, be removed by taking out letters of denization or by naturalization. Now, however, real and personal property of every description may be held and disposed of by an alien in the same manner in all respects as by a natural born British subject: see the Naturalization Act, 1870 (33 Vict. c. 14), set out *ante*, Vol. V. p. 92.

Marriage with a foreigner.

Settlements on Marriages with Foreigners.] — Questions have frequently arisen with reference to settlements or agreements for settlement entered

Marriage with Foreigner.

into on a marriage between an Englishwoman and a foreigner as to the law which is to prevail in their construction—viz., that of the domicil of the husband or of England.

English contract.

The law appears to be that where the contract is an English contract it "must be expounded according to English law, and the rights of the parties claiming under it must be recognised and dealt with according to the same law:" *per Hall*, V.-C., in *Colliss* v. *Hector*, L. R. 19 Eq. at p. 341.

Meaning of "English Contract."

But then arises the question, what is an "English contract." It does not necessarily mean a contract made in England, for there is nothing to prevent two persons in England entering into a contract in contemplation of marriage upon the terms that their rights as husband and wife *inter se* shall be regulated, and the contract construed by the laws of some foreign country; and such a contract, although an English contract in the sense of its being made in England, is, for all purposes of its construction, a contract to be governed by the law of that foreign country, and the Court would, previously to enforcing the contract, be bound to ascertain what the law of that country is. A question of foreign law is one of fact which will have to be proved like any other fact in each case before the Court which has to decide it; and is not to be decided by authority or on evidence adduced in another cause, although similarly circumstanced: *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278.

Not necessarily contract made in England.

Question of foreign law one of fact.

Contract made in foreign country between two English subjects that foreign law shall prevail.

Again, a contract may be made upon a marriage between two English subjects in a foreign country that their marriage rights shall be subject to, and the marriage contract governed by, the law of that country: *Este* v. *Smyth*, 18 Beav. 112.

But when a foreigner and an Englishwoman, either in England (*Colliss* v. *Hector*, 19 Eq. 334) or in the country of the husband's domicil (*Van Grutten* v. *Digby*, 31 Beav. 561) make an express contract previous to marriage, on the faith of which the marriage afterwards take place, and where that contract relates to the regulation of property within the jurisdiction of the English Courts, and vested in

Contract if relating to property in England—

Marriage with Foreigner.

trustees who, or the majority of whom, are Englishmen, and if it be expressed in the phraseology of English law and made in the form usually adopted in England, the contract will be treated as an English contract and expounded accordingly: *Re Cigala's Settlement Trusts*, 7 Ch. D. 351; *Van Grutten* v. *Digby*, 31 Beav. at p. 571.

vested in English trustees—expressed in phraseology of English law and in form used in England.

It is obvious that it is a question of fact in each case whether the settlement is to be treated as an English settlement, the intention of the parties to the settlement being that which must be looked to as the necessary guide. Again, where the property to be settled is partly in England and partly in a foreign country it is open for the parties to provide that the English property shall be settled according to English law, and the foreign property by the law of that foreign country; and the settlement may be made by two distinct deeds: *Van Grutten* v. *Digby*, 31 Beav. 561; or by one and the same deed; *Chamberlain* v. *Napier*, 15 Ch. D. 614.

Property in England and foreign country—settled by law of country where situate.

Distinct deeds or one and same deed.

CHAPTER III.

OF CONSIDERATIONS AND VOLUNTARY SETTLEMENTS.

	PAGE
Of Different kinds of Considerations	164
Of the Consideration of Marriage	166
The Stat. 27 *Eliz. c.* 4 ...	167
The Stat. 13 *Eliz. c.* 5	176
The Bankruptcy Act, 1883	181
The Bills of Sale Acts	185
The Customs and Inland Revenue Act, 1881	186
Of the Enforcement of Voluntary Settlements	188

Good and valuable considerations.

Of Different Kinds of Considerations.]—Considerations are of two kinds, good considerations, and valuable considerations. "A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded in motives of generosity, prudence, and natural duty: a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent for the grant; and is therefore founded in motives of justice": 2 Bl. Comm. 297. But a settlement, made upon a merely good consideration, is no less a voluntary settlement than one which is made wholly without consideration: *ibid.* And the distinction between settlements made for valuable consideration and voluntary settlements is of the utmost importance with reference to their respective liability to be defeated under the stats. 13 Eliz. c. 5 and 27 Eliz. c. 4 and the Bankruptcy Acts, and also to the question how far the aid of equity can be invoked to enforce performance of settlements and articles, and the rectification of settlements. See Vaizey on Settlements, Vol. I., pp. 66, 67.

Express and implied considerations.

Considerations may be either express or implied. An express consideration is one which is expressly declared to be the motive or inducement for the execution of a deed, and may consist of any act or thing which bears a value capable of estimation, such

as any right, interest, or benefit conferred, or agreed to be conferred, or any forbearance, loss, or liability, promised, incurred, or undertaken. A consideration is implied where any act is done or forborne by one party at the request of another, without any stipulation to that effect expressed in the deed; in which case the law presumes an adequate compensation for the act or forbearance to have been the inducement of the one party, and the undertaking of the other: 4 Com. Dig. tit. xxxii, ch. ii, s. 62. See also Smith Contr. 170.

Consideration for Settlement.

A merely formal consideration of nominal value, as *5s.*, will not cause a settlement to be deemed as founded on valuable consideration. *Walker* v. *Burrows*, 1 Atk. 93; *Kelson* v. *Kelson*, 10 Hare, 385. But, as a general rule, if the consideration is of some material value, the Court will not inquire whether it is adequate, having regard to the benefit conferred or agreed to be conferred on the giver of the consideration: *Bassett* v. *Nosworthy*, Rep. t. Finch, 102; *Bullock* v. *Sadlier*, Amb. 764; *Doe* v. *James*, 16 East, 212: *Townend* v. *Toker*, L. R., 1 Ch., 446; *Bayspoole* v. *Collins*, L. R., 6 Ch. 228. Gross inadequacy may, however, render a settlement liable to be set aside, as indicating that it was induced by fraud, or that it did not correctly embody the intention of the parties: *Rice* v. *Gordon*, 11 Beav. 265; *Callaghan* v. *Callaghan*, 8 Cl. & F. 374. And a settlement, which is founded on a valuable though inadequate consideration, is liable to be avoided as against creditors, if the beneficiaries are aware that the effect of the transaction will be to defeat the creditors' claims: *Cornish* v. *Clark*, L. R., 14 Eq. 184. A consideration for a settlement may be valuable, though not capable of being exactly estimated, as where the deed forms part of a family arrangement: *Persse* v. *Persse*, 7 Cl. & F. 279; *Williams* v. *Williams*, L. R., 2 Ch. 294; or where it is one of several deeds which are part of the same transaction: *Harman* v. *Richards*, 10 Hare, 81.

Adequacy of consideration.

Considerations which are against statutory enactment, the policy of the law, the principles of justice,

Immoral and illegal considerations.

Consideration for Settlement.

or the rules of morality, are utterly void, and vitiate all instruments founded on them both at law and in equity, according to the maxim "*Ex turpi contractu actio non oritur.*" The subject of illegal and immoral contracts has been already discussed at some length, *ante*, sub tit "BONDS," Vol. II., pp. 309, *et seq.*

Marriage a valuable consideration.

Of the Consideration of Marriage.]—Marriage, though "incapable of valuation," is "the most valuable of all considerations": see *Campbell* v. *Ingilby*, 1 De G. & J. at p. 398; *Fraser* v. *Thompson*, 4 De G. & J. at p. 661.

Ante-nuptial settlements, &c., only are supported by marriage consideration.

A settlement, or articles for a settlement, in order to be founded on the consideration of marriage, must be executed before marriage: *Spurgeon* v. *Collier*, 1 Ed. 55: *Ramsden* v. *Hylton*, 2 Ves. sen. 304; *Warden* v. *Jones*, 2 De G. & J. 76; but antenuptial articles will support a postnuptial settlement so far as based on such articles: *Cormick* v. *Trapaud*, 6 Dow. 60.

What marriages constitute a valuable consideration.

A marriage, in order to form a valuable consideration for a settlement or articles, must be valid and effectual. Thus a valuable consideration is not constituted by the celebration of a marriage in England of persons already legally though informally married in Scotland: *Ex parte Hall*, Rose, 130; nor by the ceremony of marriage, either in this country, or abroad, being gone through by persons of English domicil, who are by the laws of this country incapable of intermarrying: *Chapman* v. *Bradley*, 4 De G. J. & S. 71; *Brook* v. *Brook*, 9 H. L. C. 193; *Pawson* v. *Brown*, 13 Ch. D. 202. But a marriage valid according to English law, celebrated between English subjects in a foreign country, will constitute a valuable consideration for a settlement, though the marriage is inoperative according to the law of that country: *Este* v. *Smyth*, 18 Beav. 112. Impotence will not prevent a marriage from constituting a valuable consideration: *Cavell* v. *Prince*, L. R., 1 Ex. 246.

Covenants may be part of consideration.

Another element of the consideration for a marriage settlement often consists of the covenants which are entered into by one or other of the parties, such as covenants by the parent of the

husband or of the wife, or of both, for payment to the trustees either immediately, or at death, of a capital sum, and, in the meantime, of an annuity calculated generally at a certain rate of interest on the capital sum, or for payment of a yearly sum for a certain period; and covenants by the wife for settlement of her after-acquired property. These covenants will be considered more particularly hereafter.

Consideration for Settlement.

The Stat. 27 *Eliz. c.* 4.]—Each party's consent to the marriage is a valuable consideration for the settlement of property by the other party, and prevents an antenuptial settlement from being avoided by the statute 27 Eliz. c. 4.

Consent of parties is valuable consideration.

Under this statute, which applies to *lands and interest in lands only* (*Bill* v. *Cureton*, 2 My. & K. 503, 512), and which was made perpetual by 30 Eliz. c. 18, s. 3, it is enacted that "all conveyances, ... grants, charges, estates, incumbrances, and limitations of use or uses of, in, or out of any lands, tenements, or hereditaments whatsoever, made "for the intent to defraud and deceive such person or persons, bodies politic or corporate as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part thereof, ... shall be deemed and taken *only* as against that person and persons, ... and against all and every person or persons lawfully having or claiming by, from, or under them or any of them which have purchased or shall hereafter so purchase for money or other good consideration the same lands, tenements, or hereditaments, &c., ... to be utterly void, frustrate, and of none effect, any pretence, colour, feigned consideration, or expression of any use or uses to the contrary notwithstanding."

Stat. of Eliz. Applies only to lands.

The Act does not extend to defeat any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest, or limitation of use of, in, to, or out of any lands, &c., upon or for good consideration and *bonâ fide* (sect. 3). And sect. 4 provides that if any person shall make any conveyance, gift, grant, demise, charge, limitation of

Extent of Act.

Consideration for Settlement.

use, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause or condition of revocation, determination, or alteration at his will or pleasure, and after such conveyance, gift, &c., shall convey or charge the same lands, tenements, and hereditaments for money or other good consideration (the said first conveyance or gift, &c., not being revoked), the said former conveyance, grant, &c., shall, as against those claiming under the latter conveyance, &c., be deemed void; with a proviso protecting all lawful mortgages made *bonâ fide* upon good consideration.

Voluntary settlement of lands is void against subsequent purchaser for value with notice.

It has been long settled that every voluntary settlement of lands, although made *bonâ fide*, is void under this Act as against a subsequent purchaser for value from the settlor, even although the purchaser had notice at the time of his purchase of the existence of the settlement: *Buckle* v. *Mitchell*, 18 Ves. 100; the persons taking under such a settlement have not even an interest in the purchase-money payable to the settlor: *Daking* v. *Whimper*, 26 Beav. 568; *Evelyn* v. *Templar*, 2 Br. C. C. 148. But it is only a subsequent purchaser from the settlor himself that is thus favoured; and a subsequent conveyance for value to a purchaser by the settlor's heir-at-law or devisee will not defeat the prior voluntary conveyance: *Parker* v. *Carter*, 4 Ha. 400: see pp. 409, 410. The statute only avoids the voluntary conveyance in favour of a subsequent purchaser for *value*, and consequently the subsequent sale must be *bonâ fide*, and the consideration must not be grossly inadequate: *Metcalfe* v. *Pulvertoft*, 1 V. & B. 184.

Settlor and persons deriving title under him (not by purchase for value) bound by voluntary settlement.

As against the settlor himself and the persons deriving title under him (otherwise than by purchase for value), the voluntary settlement is binding. If the person to whom the voluntary conveyance is made sells again, and conveys to another for value, the voluntary conveyance is from that date treated as made for value: *Doe* v. *Rusham*, 17 Q. B. 732; and it will be effectual as against a subsequent purchaser for value from the voluntary settlor.

Subsequent mortgage by settlor.

A mortgage being a purchase *pro tanto*, a volun-

Consideration for Settlement.

tary conveyance will be defeated by a subsequent mortgage, but only to the extent necessary to protect the mortgagees, and where the mortgage includes, in addition to the estates comprised in the voluntary settlement, other unsettled estates, the mortgage will be thrown on the unsettled in exoneration either entirely or *pro tanto* of the settled estates : *Hales* v. *Cox*, 32 Beav. 118.

No consolidation of mortgages as against settled property.

Even prior to the Conveyancing and Law of Real Property Act, 1881, the mortgagee of property comprised in a voluntary settlement was not entitled to consolidate, as against the persons taking under the voluntary settlement, the mortgage on that property with another mortgage on other estates by the same mortgagor : *Re Walhampton Estate*, 26 Ch. D. 391.

Voluntary settlement of equity of redemption.

And where a mortgagor made a voluntary settlement of the equity of redemption in certain estates, and the mortgagee afterwards sold those estates under the paramount power of sale in his mortgage deed, the surplus proceeds of sale, after payment of what was due to the mortgagee, were held to belong to the persons claiming under the settlement as against the settlor. The sale was not a sale by the settlor, nor under any power reserved to him, and the settlement was as complete a disposition of the surplus proceeds of the sale-monies, in the event of the mortgagee exercising his power of sale, as the settlor was at the time capable of making : *Ibid.*

Judgment creditor not a "purchaser."

Where lands of a judgment debtor were comprised in a prior voluntary settlement, it was held that the judgment creditor was not a purchaser within the meaning of the stat. 27 Eliz. c. 4, and had therefore no title on that ground to set aside the settlement : *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507.

Copyholds and leaseholds at nominal rent within Act.

The Act applies to copyholds : *Doe* v. *Bottriell*, 5 B. & Ad. 131 ; and to leaseholds held at a peppercorn rent. But it has been held that an assignment of leaseholds to which a liability is attached is in itself a conveyance for valuable consideration : *Price* v. *Jenkins*, 5 Ch. D. 619 ; *Ex parte Doble*, 26 W. R. 407. But those decisions were based solely

Consideration for Settlement.

upon this particular Act, and cannot be treated as laying down for all purposes a rule of law that a voluntary assignee of leaseholds is a purchaser for value: see *Ex parte Hillman, Re Pumfrey*, 10 Ch. D. 622; *Re Ridler*, 22 Ch. D. 74. And in one case where the rent of the leaseholds was nominal, viz., "1*s.* per annum if demanded," and the property was demised and not assigned, those decisions were held inapplicable, even for the purposes of this Act: *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; and see *Hance* v. *Harding*, 20 Q. B. D. 732.

Quantum of consideration.

The question in cases of this description is whether there was consideration for the settlement. The Court does not enter into the quantum of consideration, and the question is whether the transaction was one of bargain or of gift merely. A covenant on the part of the *cestui que trust* under the settlement to indemnify that settlor against liabilities to which she was liable as mortgagor in respect of the property settled, was held to constitute sufficient consideration within the statute: *Townend* v. *Toker*, L. R. 1 Ch. 446. But *semble*, the introduction into what would otherwise be a voluntary settlement of covenants to perform acts which the law would itself impose upon the covenantor for the purpose of raising a consideration for it, would not withdraw the deed from the operation of the Act: *Ibid.* p. 459.

Limits of consideration.

The consideration of marriage extends primarily only to the contracting parties and to the issue of the marriage, who themselves, although strictly speaking strangers to the contract, are nevertheless specially the objects of the settlement: *per Cotton*, L. J., in *Andrews* v. *Andrews, Re D'Angibau*, 15 Ch. D. 228, at p. 242; and are, as "*quasi* parties to it" (*per* Lord *Cottenham*, in *Hill* v. *Gomme*, 5 My. & Cr. at p. 254), entitled to sue for the execution of the settlement made on the marriage of their parents: *Andrews* v. *Andrews*, *supra*; *Gale* v. *Gale*, 6 Ch. D. 144; *Green* v. *Paterson*, 32 Ch. D. 95, 106. But this rule does not apply in the case of a post-nuptial settlement: *Green* v. *Paterson*, at p. 104; and see *Joyce* v. *Hutton*, 11 Ir. Ch. at p. 130.

Consideration for Settlement.

Limitations in favour of collaterals.

Limitations in a marriage settlement in favour of collaterals or strangers are, as a general rule, voluntary; and although when the trust is no longer executory but executed they are binding as against the settlor and persons claiming under him, and may be enforced by volunters (*Paul* v. *Paul*, 20 Ch. D. 742), they still remain liable to be impugned, either under 13 Eliz. c. 5, by creditors at the date of the settlement, or, in the case of lands, under 27 Eliz. c. 4, by a purchaser for value: *Re Cameron and Wells*, 37 Ch. D. at p. 36.

Exception to the rule.

This general rule proceeds upon the ground that the wife cannot be considered to stipulate on the part of the relations of the husband, and there is no one therefore who purchases anything for the benefit of those relations. If there be any person purchasing on behalf of the collaterals, the limitations are supported; as in *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92, where Lord *Eldon*, speaking of the case of persons not within the consideration directly, but who, as he says, have always been so considered, preventing the effect of the statutes, puts this example: "In the case, for instance, of a father, tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son, to settle, not only upon his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the consideration of the marriage, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other 'I will not agree unless you so settle.' The Court has held such a claim not to be that of a mere volunteer, but as falling within the range of the consideration, and therefore those statutes would not bear upon it." See also the observations of *Turner*, V.-C., in *Heap* v. *Tonge*, 9 Hare, at p. 104.

Children of widow by former marriage treated

If, however, a widow, on a subsequent marriage, executes a settlement and stipulates that the children by a former marriage shall participate in the benefits of that settlement, such children are treated as also

Consideration for Settlement.

being within the consideration of that subsequent marriage: *Newstead* v. *Searles*, 1 Atk. 265 (*a*); and where a widow, in consideration of her second marriage, made a settlement of real estate on her illegitimate son, the settlement was held valid under the stat. of 27 Eliz., as against a subsequent purchaser for valuable consideration: *Clarke* v. *Wright*, 6 H. & N. 849. In his explanation of the last-named case, in the recent case of *Re D'Angibau*, *Andrews* v. *Andrews*, 15 Ch. D. 228, *Cotton*, L.J. (at p. 242), points out that, the question before the Court being whether a limitation to collaterals in a marriage settlement of real estate was void as against a subsequent purchaser for value, the settlement had been executed and completed by a conveyance of the property, and that for the conveyance *in its entirety* there was a sufficient consideration to prevent any of the estates created from being defeated by a subsequent sale. So in the case of *Clayton* v. *Earl of Wilton*, 6 M. & S. 67, n.; 3 Madd. 302; Lord *Ellenborough* and the Court of King's Bench upheld, against a purchaser for value, a limitation in favour of the issue of the settlor by a future wife in default of issue of the then intended marriage. But in that case the limitations in favour of the issue of the second marriage were so closely connected with those in favour of persons coming clearly within the marriage consideration (*b*) that effect could not be given to the latter if the former were not supported, and therefore the whole settlement was upheld. See also *Newstead* v. *Searles*, 1 Atk. 265.

as within consideration.

Settlement by widow of her real estate on illegitimate son.

Clarke v. *Wright* explained.

Limitation for issue of settlor by future marriage.

Limitations to such objects connected with those in favour of objects other than consideration.

Consideration not of marriage, but of mutual contract.

In such a case it is not the marriage consideration that can be said to include the volunteers, but

(*a*) See the cases reported under *Mackie* v. *Herbertson*, 9 App. Ca. 320 n.

(*b*) The phrase that persons "come within the marriage consideration," means that they must be treated as persons from whom consideration moves for the settlement. If there is in the settlement a limitation in favour of collaterals no consideration moves from those collaterals unless they settle property of their own": per *Kay*, J., in *Re Cameron* v. *Wells*, 37 Ch. D. 32, 36.

Consideration for Settlement.

only the consideration of the mutual contract entered into upon the marriage.

"The considerations of the contract, though founded on marriage, must extend to all those terms of the contract on which depend the interests of the persons who are within the consideration of marriage; and when they take only on terms which admit to a participation with them, others who would not otherwise be within the consideration, then not the matrimonial consideration properly so called, but the considerations of the mutual contract extend to and comprehend them:" *per* Lord *Selborne*, in *Mackie* v. *Herbertson*, 9 App. Ca. at p. 337.

Exception confined in favour of children of wife—not husband—and to provision by ante-nuptial settlement.

The rule as to a settlement upon the children of the wife by a former marriage "has been engrafted as an exception on the general rule of law as to the rights of volunteers, as these children are not in the position of ordinary volunteers:" *per Fry*, J., in *Gale* v. *Gale*, 6 Ch. D. 144, 152. In that case a covenant by a widow, contained in the settlement made on her second marriage, to surrender copyholds upon trust for her children by a former marriage was enforced after her death at the suit of those children. Such an action, however, would not be maintainable when the settlement is not ante-nuptial: *Jefferys* v. *Jefferys*, Cr. & Ph. 138. Nor does the exception appear to have been extended in favour of the children of a man by his former wife. In *Jthell* v. *Beane*, 1 Ves. sen. 215, it would seem that such children were treated as being within the consideration; and in *Clarke* v. *Wright*, 6 H. & N. 849, *Cockburn*, C.J., in reviewing the decision of *Newstead* v. *Searles*, 1 Atk. 265, seems to draw no distinction between the cases of settlement by a widow and settlement by a widower.

Exclusion of child of husband from benefit of rule.

But in *Price* v. *Jenkins*, 4 Ch. D. 483, *Hall*, V.-C., expressly decided that a child of the husband by a former marriage was a mere volunteer with respect to a settlement in his favour made on his father's second marriage; and though the decision was reversed on appeal (see 5 Ch. D. 619) on a different ground, the judges expressly refrained

Consideration for Settlement.

from giving any opinion upon the question whether the provision in favour of the son was or was not voluntary. And in the case of *Re Cameron & Wells*, 37 Ch. D. 32, *Kay*, J., held that the exception introduced by *Newstead* v. *Searles*, 1 Atk. 265, should not be extended to the case of a widower.

Reason for exclusion.

Mr. Dart suggests that the considerations which are applicable in the case of a widow settling her property upon the children of her former marriage do not apply where the husband is the settlor, for the main ground of the decision of Lord *Hardwicke* in *Newstead* v. *Searles* was that a different decision would render it impossible for a widow on her second marriage to make any certain provision for her issue by a former one: see Dart. V. & P. 1014. It seems formerly to have been considered that as by the act of marriage the husband acquired rights in his wife's property, it was more easy to imply a bargain between the parties when the husband gave up some right in his wife's property to which he would have been entitled by virtue of the marriage.

How affected by Married Women's Property Act.

But if that be the true reason for the distinction, it seems to follow that, as since the Married Women's Property Act, 1882, the act of marriage confers on the husband no rights in his wife's property (except in the event of her intestacy), the whole foundation of the alleged distinction is removed, and that for the future provisions in an ante-nuptial settlement in favour of the existing children of a prior marriage, either of the husband or the wife, must be governed by the same principles, and such children must be all equally excluded or included.

Post-nuptial settlement voluntary unless in pursuance of ante-nuptial agreement.

Post-nuptial settlements, unless made in pursuance of an ante-nuptial agreement, are voluntary, but a very small consideration is sufficient to support them under the stat. 27 Eliz. c. 4, *e.g.*, a loan of money, although secured by a promissory note, which might have been called in the next day, advanced by a relative of the wife upon a bargain made with the settlor (the husband): *Ford* v. *Steuart*, 15 Beav. 493; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228. So, too, a modification of the interests of the husband and wife in the property settled has

Modification of interest of husband and

Consideration for Settlement.

been held to constitute a sufficient consideration to make the settlement good under the statute, *e.g.*, the surrender by a husband of his right to the receipt of the rents and profits of his wife's real property during the coverture: *Hewison* v. *Negus*, 16 Beav. 594; affirmed on appeal, 17 Jur. 567; *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630; *Re Foster & Lister*, 6 Ch. D. 87. So, too, "a release of dower by a wife has been considered to be a sufficient consideration to constitute her a purchaser of a settlement of the property of her husband made on that consideration:" *per Romilly*, M.R., in *Hewison* v. *Negus*, 16 Beav. p. 598.

wife in property.

Release of dower.

Husband may purchase from wife.

And, conversely, a husband may become a purchaser from his wife of property belonging to her; and a bargain between a husband and wife, when the husband settles property of his own upon his wife in consideration of her settling property of her own upon him, will be upheld: *Schreiber* v. *Dinkel*, 54 L. T. 911; W. N. 1886, p. 78. The bargain must be "a bargain between husband and wife, altering their relative positions as to the estate, and their relative rights and interests in the estate": *per Jessel*, M. R., in *Re Foster and Lister*, 6 Ch. D. 87, 90, that is to say, it must be shown that there is a bargain that either one or the other party to it is to give up something, before it can be held that it is for value.

Bargain.

Post-nuptial settlement of wife's separate property.

But it has been held that where freehold property was given to a married woman for her separate use, and a *post-nuptial* settlement was executed, in which the husband and wife joined in conveying the property to trustees upon trust for the wife for her separate use for life, with remainder to the husband for life, with remainder to the children, if any, with an ultimate remainder to the wife absolutely, the conveyance by the husband, though binding on the husband's estate by the curtesy, which he would have had in the event of there being issue in the absence of any conveyance by the wife, was not sufficient to raise any consideration moving from the husband, and consequently the settlement was voluntary and void under the 27 Eliz. c. 4, as against a

Consideration for Settlement.

subsequent mortgagee from the husband and wife: *Shurmur* v. *Sedgwick*, 24 Ch. D. 597.

Settlement for value as between husband and wife voluntary as regards strangers.

A post-nuptial settlement, although by reason of an exchange of interests between husband and wife, it is as between them a settlement for valuable consideration, may still be voluntary as regards others not parties to the contract: *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 228; and the children of the settlors, unless parties to the contract, have no *locus standi* to sue for the execution of such a settlement. "The consideration of marriage is not infused into the settlement. It is made for considerations which arise after the marriage, and therefore in point of principle I am unable to see how the exception which applies to an antenuptial settlement, giving children of the marriage a right to sue for the performance of those covenants, can apply to post-nuptial settlements:" *per Fry*, L.J., in *Green* v. *Paterson*, 32 Ch. D. 95, 107.

Settlement valid as against purchasers, fraudulent as against creditors.

The Stat. 13 *Eliz. c.* 5.]—A settlement, which by reason of the existence of consideration is not as against purchasers invalidated by the stat. of 27 Eliz. c. 4, may nevertheless be held to be voluntary and fraudulent against creditors within the stat. of 13 Eliz. c. 5.

Under this stat. (which applies not only to lands but to goods and chattels), made perpetual by 29 Eliz. c. 5, it is enacted that—

13 Eliz. c. 5.

> All and every feoffment, gift .... and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them ... made to or for the end purpose and intent, to delay, hinder or defraud creditors and others of their just actions, suits, debts, &c., shall be deemed and taken only as against that person or those persons, his or their heirs, &c., whose actions, suits, debts, &c., by such guileful covenous or fraudulent devices or practices, are, shall or may be in any wise disturbed, hindered, delayed or defrauded, to be utterly void, frustrate, and of none effect."

But sect. 5 provides that the Act shall not extend to any estate or interest acquired for valuable consideration *bonâ fide* without notice of any fraud.

Settlement

A settlement may be fraudulent although not

Consideration for Settlement.

voluntary : *Harman* v. *Richards*, 10 Hare, at p. 89 ; and in some cases even ante-nuptial settlements, notwithstanding the marriage consideration, have been set aside on the ground that they were made with the object of defeating the interests of creditors : *Columbine* v. *Penhall*, 1 Sm. & G. 228 ; *Bulmer* v. *Hunter*, L. R. 8 Eq. 46 ; and see *Re Pennington*, W. N. 1888, p. 205, where these two cases were approved by the Court of Appeal. But such a settlement can only be impeached when the marriage was itself part of the scheme to defraud the creditors : *Kevan* v. *Crawford*, L. R. 6 Ch. D. 29 ; and where both husband and wife were parties to the scheme : *Fraser* v. *Thompson*, 1 Giff. 49. Consequently, where a trader, being hopelessly insolvent, arranged a marriage with a lady on the terms of settling upon her 20,000*l.*, and executed a settlement containing a recital (false to the knowledge of the settlor), that he was indebted to the lady in a sum of 20,000*l.*, by which settlement he covenanted in consideration of the debt, and the intended marriage, to pay 20,000*l.* to the trustees upon the trusts of the settlement ; the lady being innocent and ignorant of the fraud, the settlement was enforced against the trustee in bankruptcy of the settlor ; *Jessel*, M. R., in giving judgment on the appeal, said, "She gave valuable consideration, consideration of marriage. Whether that recital were in or were out of the settlement, the covenant to settle the 20,000*l.* in consideration of the marriage would have been a covenant for value, and would have prevailed against creditors. . . . . I entirely concur with the V.-C. in the conclusion he came to that the settlement was for value given by the wife, namely the consideration of marriage, and that she was no party to the fraud, and that it is unimpeachable on the part of the creditors": *Kevan* v. *Crawford*, 6 Ch. D. at p. 38.

fraudulent though not voluntary.

Ante-nuptial settlement made to defeat creditors set aside.

Marriage part of scheme.

Wife party to scheme.

Where wife innocent settlement upheld.

Where the instrument attempted to be set aside is founded on valuable consideration, an actual and express intent to defraud creditors must be proved, and an intent on the part not only of the settlor but also of the purchaser. The fraudulent intent of

When settlement for value impeached, intent to defraud must be proved.

Consideration for Settlement.

the settlor alone would not avoid the instrument: *Holmes* v. *Penney*, 3 K. & J. 90; *Lloyd* v. *Attwood*, 3 De G. & J. 614; *Re Johnson, Golden* v. *Gillam*, 20 Ch. D. 389. And the fact that a *bonâ fide* creditor is hindered, or even defeated, is not of itself sufficient to set aside a deed founded on valuable consideration: *Holmes* v. *Penney*, *supra*; *Re Johnson, Golden* v. *Gillam*, 20 Ch. D. at p. 396. And where the deed is a *bonâ fide* family arrangement and for valuable consideration, the fact that the consideration given does not represent the real value of the estate, cannot be taken as a badge of fraud: *Re Johnson, Golden* v. *Gillam*, at p. 397.

Where settlement voluntary, proof of fraudulent intention not always necessary.

Where, however, the settlement is voluntary, it is not necessary always for the purpose of avoiding it under 13 Eliz. c. 5, to prove the existence of any fraudulent intention on the part of the settlor; and certainly not so, in cases where the facts are such as to show that the necessary consequence of what was done was to delay creditors: *Spirett* v. *Willows*, 3 De G. J. & S. 293; *Freeman* v. *Pope*, L. R. 5 Ch. 538.

Settlement by man greatly in debt.

If a settlement is made voluntarily by a man who is deeply involved at the time, of course such intention is easily shown: *Taylor* v. *Coenen*, 1 Ch. D. 636; but, where that is not the case, but where nevertheless the settlement is made voluntarily, and

Where necessary effect to defeat creditors.

the necessary effect of it is to defeat, delay, or hinder creditors, then the intention is presumed: *Ware* v. *Gardner*, L. R. 7 Eq. 317. The reason assigned for this in numerous cases has been that a man must be presumed in point of law to have intended the necessary consequences of his own acts. But as has been pointed out by *Lindley*, L. J., in a very recent case (*Re Wise, Ex parte Mercer*, 17 Q. B. D. at p. 301), the language of the phrase is "apt to mislead by confusing the boundary between law and fact, and the consequences which can be foreseen with those which cannot."

Voluntary settlement by person

Where a man already engaged in trade (*Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglas*,

Consideration for Settlement.

L. R. 14 Eq. 106 (*c*)), or about to engage in trade (*Ex parte Russell, Re Butterworth*, 19 Ch. D. 588), makes a voluntary settlement of the bulk of his property, and incurs liabilities in his trade, he is doing a fraudulent act within the meaning of the statute, because he is taking away the property which would be available for his creditors; and that settlement will be void as against creditors, not only those existing at the date of the settlement, but also those who become such in the course of his trade: *Spirett* v. *Willows*, 3 De G. J. & S. 293; and the fact that at the date of the settlement he owed no debt which was unpaid at the bankruptcy is not material: *Ware* v. *Gardner*, L. R. 7 Eq. 317; *Mackay* v. *Douglas*, L. R. 14 Eq. 106.

trading or about to trade.

Settlement void against creditors at date, and also subsequent creditors.

Where all debts at date of settlement paid prior to bankruptcy.

Nor is it necessary that he should at the date of the settlement contemplate trading, it is enough if he voluntarily makes a settlement, and subsequently goes into trade. In the case of *Re Pearson, Ex parte Stephens*, 3 Ch. D. 807, *Bacon*, C. J., held that a voluntary settlement of a sum of 1000*l.* made in 1858 by a person not then indebted, and who first went into trade in 1873 and became bankrupt in 1875, was wholly void under this statute as against his creditors. But, in that case, the settlor settled the life interest in his own fund upon trust for himself until he should assign, &c., or become bankrupt, which that judge treated as tantamount to a declaration by the settlor that his creditors should not get it. But it may be doubted whether, as regards the other limitations of the settlement other than the life interest, the decision was under the circumstances consistent with the other decisions.

Trading subsequent to—not contemplated at date of settlement.

For it has been held that where a person makes a voluntary settlement being perfectly solvent at the time, and remains solvent after deducting from his assets the property settled, and who does not at the date of the settlement contemplate going into trade or engaging in any hazardous business trans-

(*c*) This case is described by *Lindley*, L. J., as being "one of the most valuable decisions on the stat. of Elizabeth," see *Ex parte Russell, Re Butterworth*, 19 Ch. D. at p. 601.

Consideration for Settlement.

actions, such a settlement will be good: *Holloway* v. *Millard*, 1 Madd. 414; nor will it be invalidated, if some years afterwards under a totally new arrangement he engages in trade and becomes insolvent: *Mackay* v. *Douglas*, L. R. 14 Eq. at p. 121.

Principle of cases.

The principle of the cases on this point is summed up by *Jessel*, M.R., in *Ex parte Russell, Re Butterworth*, L. R. 19 Ch. D. at p. 598, as being "that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: If I succeed in business I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss. That is the very thing which the statute of Eliz. was meant to prevent."

Power to revoke reserved.

A voluntary settlement with a power of revocation, or a general power to mortgage, is deemed to be on the face of it fraudulent within the statute: *Tarback* v. *Marbury*, 2 Ver. 510.

Covenant by man to settle after-acquired property.

In several cases a question has been raised whether a covenant by a man to settle future-acquired property, *e.g.*, "all the property that shall come to him," is so wide in its terms as to be void as against public policy, on the ground that, if fully carried into effect, it would deprive the covenantor of all means of paying his debts, and of all his livelihood; but the point has not been definitely decided, and has been left open by the Court. See *Re Clarke, Coombe* v. *Carter*, 36 Ch. D. 348; *Tailby* v. *Official Receiver*, 13 App. Cas. 523 (reversing the decision of the Court of Appeal, 18 Q. B. D. 25); *Re Turcan*, 40 Ch. D. 5.

Whether and when void.

An assignment of after-acquired property is of course possible neither at law nor in equity; but is in equity treated as amounting to a contract for value to assign the property when it comes into possession, which the Court of Equity will specifically enforce.

Covenant whether divisible or not.

The Court looks at the covenant to see whether, although, if read as one covenant, it would embrace all the covenantor's property, it can be read as a divisible covenant, and then, if the property (the right to which is in question) can be brought within any

Consideration for Settlement.

particular class of property referred to in the covenant, it will be bound by the covenant: *Bennett* v. *Cooper*, 9 Beav. 252; *Re Clarke, Coombe* v. *Carter*, 36 C. D. 348; *Tailby* v. *Official Receiver*, 13 App. Ca. 523; *Re Turcan*, 40 Ch. D. 5.

Vagueness of covenant.

A covenant in general terms may be so wide and vague in its terms that the Court will be unable to understand the meaning of it, and such a covenant will be void both at law and in equity; but a covenant is not vague in this sense by reason of the property not being ascertained at the time of the contract. There is no need to identify the property at the time of making the covenant, if it is capable of identification at the time when the covenant is sought to be enforced: *Re Clarke, Coombe* v. *Carter*, 36 Ch. D. 348.

Settlement avoided under Bankruptcy Act.

The Bankruptcy Act, 1883.]—It will here be convenient to refer to those settlements which fall within the provisions of the Bankruptcy Acts. The Act now in force (46 & 47 Vict. c. 52), by sect. 47, which also applies to composition or arrangement (sect. 18, sub-s. 13), enacts as follows:—

(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in

Consideration for Settlement.

possession or remainder, and not being money or property of or in right of his wife, shall on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

(3) "Settlement" shall for the purposes of this section include any conveyance or transfer of property.

This section is not limited, as was sect. 91 of the Act of 1869, to traders, but with that exception, and that the words at the end of sub-sect. (1) were not in the earlier section, is substantially identical with that section, and the cases under the former Act will be authorities upon the later.

How far retrospective.

The former enactment was held to be retrospective and applicable to a settlement made before the date of the Act: *Re Dawson*, L. R. 19 Eq. 433. And it has been held by *Mathew*, J., in *Re Player*, 54 L. J. Q. B. 553, that sect. 47 of the Act of 1883 is retrospective, so far as it is substituted for and is identical with sect. 91 of the Act of 1869; see also *Ex parte Todd, Re Ashcroft*, 19 Q. B. D. 186. But in the last case the Court of Appeal also held that sect. 47, so far as its provisions differ from the other section, does not apply to settlements made before 1st January, 1884; accordingly it cannot apply to any settlement by a non-trader executed before that date, nor can the final clause (which is a new enactment) apply to any settlement executed by a trader before that date": per Lord *Esher*, M. R., at p. 195.

Meaning of "property."

Although by sect. 168 of the later Act "property" includes "money," it has been held in a recent case (*Re Player*, 15 Q. B. D. 682) that a gift of money to a son to enable him to commence business on his own account was not a settlement of "property" within the meaning of this sect., cl. 1; and that by the word "settlement" mentioned in the section, notwithstanding its definition in sub-sect. 3, as a "transfer of property," was meant a settlement in the ordinary sense of the word, which might be effected by a conveyance or transfer (*e.g.*, a transfer of shares to trustees, *Ex parte Todd, Re Ashcroft, supra*). A

Out and out gift of money not a settlement of property.

Meaning of settlement.

Consideration for Settlement.

purchase by a father in the name of his son of shares which are subsequently registered in the son's name, and on which the son receives the dividends, would be a 'settlement' within the section, as being an advancement to the child: per *Malins*, V.-C., in *Mackay* v. *Douglas*, L. R. 14 Eq. 106, 121; referring to *Stileman* v. *Ashdown*, 2 Atk. 477. But a gift of money, which is, or may be, expended immediately, cannot be so treated: *Re Player*, *supra*.

Capacity to pay debts without aid of settled property. How to be tested.

In considering whether a trader is "able to pay his debts without the aid of the property comprised in the settlement," it was held in *Ex parte Russell*, *Re Butterworth*, 19 Ch. D. 588 (a case on sect. 91 of the Act of 1869), that he could not take into account as assets, the value of the implements of his trade, and of the goodwill of his business if he intended to continue to carry on his business. The Court looks not merely at the amount of his assets and liabilities, but also considers the position he is assuming. Assets which could be reasonably taken into consideration as available for payment of debts if he were retiring from business (*e.g.*, goodwill, plant, &c.), cannot be so taken into account when he is intending to continue business. "He must be able to pay his debts in the way in which he proposes to pay them, that is, by continuing his business": see per *Lindley*, L. J., at p. 601.

Covenant in marriage settlement to pay sum of money.

A covenant in a marriage settlement for the payment of a sum of money is not such a covenant as is affected by sub-sect. 2 of sect. 47; and in the event of the subsequent bankruptcy of the covenantor, the trustees will be allowed to prove in the bankruptcy under the covenant (*d*): *Ex parte Bishop*, *Re Tonnies*, L. R. 8 Ch. 718. The words "money" and "property" therein mentioned both refer to something that can be specifically ear-marked; "the intention of the Act (*i.e.*, of 1869) being to prevent settlements of property" (that is, some specific pro-

Specific property intended.

(*d*) Whether the subsequent discharge of the bankrupt under sect. 30 would release him from the liability of this covenant, or of a covenant to settle a specific property not existing at the time, seems to be open to doubt: see *Collyer* v. *Isaacs*, 19 Ch. D. 342, 352.

Consideration for Settlement.

perty) "expected to accrue at a future time in which the settlor had no present interest": per *James*, L. J., in *Ex parte Bishop, Re Tonnies*, L. R. 8 Ch. at p. 721.

It would seem, therefore, that if a person being about to marry, were to covenant to settle any definite property or definite sum of money which he expected to come to him from some particular source, that property or money would fall within the section. But where a mother had a limited exclusive power of appointment among her children, who in default of appointment were entitled to the property in equal shares, a covenant by one son (a trader) to settle what he should derive from the exercise of the power, or in default thereof, was held unaffected by the corresponding provision of sect. 91 of the Act of 1869, as the son had a then vested interest in the property, subject to be divested by an appointment: *Re Andrews'* Trusts, 7 Ch. D. 635.

Property in which settlor has vested interest liable to be divested.

Covenant to settle all property without limit, void.

It would seem that a covenant to settle *all* property to which the covenantor might become entitled during the joint lives of himself and his wife is a fraud upon creditors, and void, although made in consideration of marriage and though the settlor be solvent at the time: *Ex parte Bolland, Re Clint*, L. R. 17 Eq. 115.

Married woman trading separately can be made bankrupt.

It must be remembered that under the Married Women's Property Act, 1882, "every married woman (including women married before 1st January, 1883) carrying on a trade separately from her husband, shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a *feme sole*" (sect. 1, sub-sect. 5); and that "no settlement or agreement for a settlement by a woman shall have any greater force or validity against her creditors than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors," sect. 19.

Dealing with bankrupt in good faith and for valuable consideration.

In the case of *Hance* v. *Harding*, 20 Q. B. D. 732, where, by a post-nuptial settlement made in pursuance of an arrangement between the settlor and his father, the settlor assigned policies on his life to trustees upon trusts for the benefit of his

children, the father at the same time assigning certain leaseholds to the trustees upon similar trusts, the father was held to be a "purchaser for valuable consideration" within the meaning of sect. 91, the children having found that the transaction was *bonâ fide*. The giving up by the father of property of his own to induce his son to settle his life policies was a sufficient valuable consideration. In the case of *Ex parte Hillman, In re Pumfrey*, 10 Ch. D. 622, the conveyance was purely voluntary, the trustees who were alleged to be purchasers had given nothing, there was no consideration moving from or to either of the parties, and the Court there held that the word 'purchaser' must not be treated as a conveyancing term, but must be considered as applying to cases where a *quid pro quo* is given.

Consideration for Settlement.

By sect. 29 of the Bankruptcy Act, 1883: (1) In the case of a settlement made before and in consideration of marriage, where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or (2) in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property, wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife): if the settlor is adjudged bankrupt or compounds or arranges with his creditors, and it appears to the Court that such settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend the order of discharge.

Bankruptcy Act, 1883, s. 29.

The Bills of Sale Acts.]—Ante-nuptial settlements comprising personal chattels are exempted from the operation of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), sect. 4, and consequently of the Amendment Act, 1882 (45 & 46 Vict. c. 43), sect. 3.

Ante-nuptial settlements.

Post-nuptial settlements, unless made in pursuance of ante-nuptial articles, are not within this exemp-

Post-nuptial settlements.

Consideration for Settlement.

tion, and therefore unless properly attested and registered, are void, in respect of the personal chattels comprised therein, as against the trustee in bankruptcy, or creditors of the settlor: *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510; and see *Ex parte Cox*, 1 Ch. D. 302; *Wright* v. *Redgrave*, 11 Ch. D. 28. But as such settlements are not made by way of security for payment of money, they do not come within the mischief of the Act of 1882.

As to the formalities as regards registration, &c., required by the Bills of Sale Act, 1878, see *ante*, sub tit. "MORTGAGES," Vol. III., pp. 805 *et seq.*

Voluntary settlements formerly made to evade death duties.

The Customs and Inland Revenue Act, 1881.]—The low rate of duty imposed by the Revenue Acts on settlements of personalty, as compared with the several imposts affecting such property in its devolution from a deceased owner under a will or intestacy, formerly offered a strong temptation to persons to dispose of their property among their families by voluntary settlement rather than by will. Even so, however, the expedient was attended with some inconveniences. A will, from its revocable nature, more readily adapts itself to the varying schemes of posthumous disposition which changes of circumstances or of feeling may suggest to the mind of the yet living owner, than a deed which can only be made subservient to such alterations of purpose through the medium of a power of revocation. It often happens, too, that the personalty intended to be disposed of is of such a nature as not to be conveniently susceptible of a settlement by deed, as where it is embarked in trade, or is otherwise undergoing frequent fluctuations.

The main inducement to the adoption of this mode of disposing of property has been taken away, first, by the Succession Duty Act (16 & 17 Vict. c. 51) and the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), which impose duties on successions on death arising otherwise than under testamentary dispositions; and, secondly, by the Customs and Inland Revenue Act, 1881.

Stamp duty on accounts

By sect. 38 of the last mentioned Act (44 & 45

Consideration for Settlement.

Vict. c. 12), successions to personal or movable property passing under any voluntary settlement, or other instrument, not taking effect as a will, made either before or after the 1st of June, 1881, by a person dying on or after that day, "Whereby an interest in such property for life, or for any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property," are now charged with stamp duty, at rates equivalent to probate duty, on accounts to be delivered as to such property: see this section set out at length and considered, *post*, sub tit. "STAMP DUTIES," Vol. VII., pp. 195 *et seq.*

relating to voluntary settlements.

Settlement valid as against subsequent purchaser may be voluntary within the Act.

The question whether a settlement is voluntary or not within the meaning of this Act depends on the substance and objects of the transaction. If it appears that the transaction, in its origin, was intended to operate by way of free gift to the transferee, but only upon the condition that the settlor should substantially retain to himself the interest in the property for his life, the settlement will be voluntary within the meaning of the Act, although on the face of the deed and in fact there be sufficient consideration to support a contract between the parties, and to take it out of the stat. of 27 Eliz. c. 4, as regards a subsequent purchaser. It does not follow that because a settlement may be valid as against a subsequent purchaser it cannot be a voluntary settlement within the meaning of this Act: *Crossman* v. *The Queen*, 18 Q. B. D. 256.

Where the Court sees that the arrangement carried out by the settlement has obviously for its object the avoidance of stamp or succession duties on the death of the settlor whenever that event may happen, which is a legitimate object, then, notwithstanding the *bona fides* of the transaction resulting in the settlement, the settlement is voluntary: ibid.

In that case the Court held that a deed dated 12th July, 1883, whereby a father, in pursuance of

Consideration for Settlement.

a power given him by articles of partnership, appointed and transferred to his sons his shares in the business as from the 1st Oct., 1883, or as from his death, whichever should first happen, provided that such appointment were conditional upon the execution by the sons before 1st Oct. 1883, of a deed covenanting to pay the father from that date during his life interest at 4 per cent. per annum on the value of the shares appointed, and to pay out of the profits certain annuities to other persons, was a voluntary settlement within the Act; that the deed of covenant which the sons had executed the same day (12th July, 1883), was in substance a mere mode of reserving to the father a life interest in the shares to the extent of 4 per cent. upon their value; and that therefore stamp duties were payable under the section on the amount of the shares transferred.

Interest reserved to settlor within Act notwithstanding discretion in trustees to deprive him thereof.

And it has been held that notwithstanding a discretion given to the trustees of a voluntary settlement to deprive the settlor of the benefit of an interest in the settled property reserved to him, that benefit is still an "interest reserved to the settlor" within the meaning of sect. 38, sub-s. 2 (*c*): *Att.-Gen.* v. *Heywood*, 19 Q. B. D. 326. In that case, by a voluntary settlement a settlor assigned a sum of 43,000*l.* to trustees upon certain trusts, and it was declared that the trustees should during the life of the settlor apply the income for the benefit of him and his, then, or any future wife and children, or at the discretion of the trustees for the benefit of such one or more of such persons to the exclusion of the others as the trustees should think fit, and during the life of the settlor accumulate the residue for the benefit of the persons who under the trusts therein declared might become entitled, and after the settlor's death the property was to be held subject to certain trusts in favour of his widow and children.

Voluntary settlement if incomplete will not be perfected by Court.

Enforcement of Voluntary Settlements.]—A voluntary settlement, if perfected by the settlor, will be enforced by the Court, but if anything more has to be done to give effect to it, the Court declines to interfere. A completed gift cannot be recalled; but

Voluntary Settlements.

an imperfect gift is not enforceable however clearly it may appear that it was at one time intended.

Gift completed by actual transfer or declaration of trust.

A settlement will be held to be perfected by the settlor where he has done everything which, having regard to the nature of the property settled, is required to be done on his part to make it binding upon him. Thus a gift may be completely and irrevocably made either by an actual transfer of the property to the intended beneficiary, or to a trustee to hold for the purposes of the proposed settlement; or by a declaration that the settlor holds the property in trust for those purposes: see *per Turner*, L. J., in *Milroy* v. *Lord*, 4 De G. F. & J. 264, at p. 274, and *per* Lord *Young* in *Mackie* v. *Herbertson*, 9 App. Ca. 303, at p. 309 n.

Declaration in writing or by parol.

A declaration of trust by the settlor of personal property may be either in writing or by parol: *per Turner*, L. J., in *Milroy* v. *Lord*, *supra*, at p. 274. But whichever mode of settlement be adopted that mode must be effectually carried out. The Court will not give effect to an imperfect transfer by holding it to be an effectual declaration of trust.

Voluntary assignment of stocks and shares inoperative.

Thus if a settlement be intended to be made of stock and shares which are transferrable in the books of the bank or company, an assignment of them to trustees will be inoperative in favour of volunteers.

Secus where interest of settlor reversionary.

But if the settlor's interest in those stocks or shares be reversionary only, and the stock or shares are standing in the names of trustees in the books of the bank, then an assignment of that reversionary interest, being all that the settlor is able to do, will be operative as an assignment in favour of the volunteers, and the settlor will be bound by it.

Distinction between voluntary trust and voluntary contract to create trust.

Again, the distinction between a voluntary trust, and a voluntary contract to create a trust, is to be noted. A voluntary trust actually created, that is, where the relationship of trustee and *cestui que trust* has been constituted, will be enforced in favour of volunteers: *Paul* v. *Paul*, 20 Ch. D. 742; *Standing* v. *Bowring*, 31 Ch. D. 282. But where no trust has been created, but the matter lies in contract only, there the Court will not lend its assistance: *Re*

Voluntary Settlements.

D'Angibau, Andrews v. *Andrews,* 15 Ch. D. 228, 242; see *Ellison* v. *Ellison,* 6 Ves. 656; *Pulvertoft* v. *Pulvertoft,* 18 Ves. 84.

Settlement in favour of creditors.

The established rule of equity is thus stated by *Shadwell,* V.-C., in *Garrard* v. *Lord Lauderdale,* 3 Sim. at p. 11: "Where there is an actual settlement made for vesting an estate in trustees, or for vesting stock in trustees for volunteers, there the legal character being complete, the persons who have the legal character are trustees for the volunteers, who may claim as *cestuis que trust* against the trustees under the deed." In this case a bill was filed by a creditor to enforce a deed, whereby the then late Duke of York assigned to trustees certain personal property upon trust to sell the same, and after satisfying certain specified charges out of the proceeds, to divide the residue amongst the creditors of the Duke, whose names were mentioned in the schedule to the deed, and who were named as parties to the deed. The plaintiff was one of the scheduled creditors, but neither he nor any of the other creditors had executed the deed. The V.-C. held, on the authority of *Walwyn* v. *Coutts,* 3 Mer. 707; 3 Sim. 14, that where a person without consideration and without notice to the creditors voluntarily makes a disposition as between himself and trustees for the payment of his debts, the trustees are to be treated merely as his agents for the purpose of paying the debts according to his directions—that there is no relationship of trustee and *cestui que trust* created as between the trustees and the creditors—and that the settlor can during his lifetime revoke the agency. This decision was affirmed on appeal by Lord *Brougham,* C., 2 Russ. & My. 451; and see *Acton* v. *Woodgate,* 2 My. & K. 492; *Bill* v. *Cureton,* 2 My. & K. 503, 511.

In *Walwyn* v. *Coutts, supra,* the disposition by deed was in favour of creditors generally; *Garrard* v. *Lord Lauderdale, supra,* decided that the fact that the names of the creditors and the amounts due to them were scheduled made no difference.

Where existence of settle-

But if the existence of the disposition in his favour has been communicated to the creditor by the settlor

or by the trustees, then the right of the settlor to determine the agency ceases: *Acton* v. *Woodgate*, *supra*. But communication to one creditor enures to his benefit only, and not to that of any other creditor to whom no communication has been made: *Johns* v. *James*, 8 Ch. D. at p. 750.

ment communicated to creditor.

And the principle being that the assignor or settlor has the power of revoking the directions given to his agent, the doctrine of *Garrard* v. *Lord Lauderdale* will not apply where the trusts in favour of the assignor's or settlor's creditors are not to arise until after his death. Thus, under a voluntary settlement certain freehold estates were limited subject to existing mortgages thereon, to the use of the settlor for life, with remainder to the use of trustees for a term of five hundred years, and subject thereto in strict settlement. The trusts of the term were that the trustees should, after the death of the settlor and thereafter for twenty-one years, raise an annual sum of 1000*l.* and accumulate the same at compound interest, and on the expiration of twenty-one years, or during the period, apply the annual sum and the accumulations thereof in or towards the satisfaction and discharge of all such mortgages as should then be charged on the estates, and pay the surplus of the rents to the person entitled to the immediate reversion of the estate. The first tenant in tail in possession, seven years after the settlor's death, barred the entail and limited the property subject to the mortgages but free from the trusts, including those of the five hundred years term, to himself in fee, and then claimed to be entitled to the past accumulations and to stop any further accumulation. The Court of Appeal held that the mortgagees were constituted by the settlement objects of the settlor's bounty equally with the applicant, and must be considered as *cestuis que trust*, and as such capable of enforcing the trusts of the deed, and further held in accordance with the doubt expressed by Lord *Cranworth*, C., in *Synnot* v. *Simpson*, 5 H. L. C. 121, that the doctrine of *Garrard* v. *Lord Lauderdale*, *supra*, did not apply when the trusts declared were not to take effect till after the death

Revocability of directions to agent where trusts arise only on settlor's death.

Voluntary Settlements.

of the settlor: *Re Fitzgerald's Settlement, Fitzgerald* v. *White*, 37 Ch. D. 18.

Voluntary settlement not rectified against settlor.

A voluntary settlement will not be rectified against the will of the settlor, as that would be to enforce a contract between parties for the due execution of a voluntary deed: *Lister* v. *Hodgson*, L. R. 4 Eq. 30. If a voluntary settlement does not express the intention of the grantor, the grantor may make a fresh deed, and with the assent of the grantee cancel the old one, but the Court cannot compel a grantor to alter the grant, and if the grantor contests it the deed must stand or fall in its actual condition without alteration: *Broun* v. *Kennedy*, 33 Beav. at p. 147.

Rectification after death of settlor.

But if the voluntary settlor be dead, and it is proved from the instructions given for the settlement, or otherwise, that the deed was not prepared in the exact manner which he had intended, the deed may be reformed and those particular provisions necessary to carry his intention into effect may be introduced: *per Romilly*, M.R., in *Lister* v. *Hodgson*, *supra*, at p. 34. And where a voluntary settlement was completed by actual transfer, the Court declined to upset it at the suit of the settlor's personal representative as made on an illegal consideration: *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275; in that case the distinction is drawn between a voluntary gift, valid and irrevocable at law, and a bond or covenant founded on an illegal consideration.

Peculiarity of provisions in voluntary settlement.

In many cases, where a voluntary settlement has been impeached by the settlor, the Court has had regard to, and fastened upon such facts as, the absence of usual, or introduction of unusual provisions, the absence of powers of revocation, or of appointment in default of issue, or of appointment of new trustees (*Coutts* v. *Ackworth*, L. R. 8 Eq. 558; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Everitt* v. *Everitt*, L. R. 10 Eq. 405), as grounds for invalidating it. But the real point to be regarded in each case is, not so much the omission or introduction of any particular clause (although they are treated as circumstances to be taken into account), but whether the settlor thoroughly understood what he was doing, or was protected by independent advice.

Voluntary Settlements.

And it is not enough to show that the deed was read over to or by the settlor; it must be shown that the settlor thoroughly understood how his or her position, as regards the property comprised in the settlement, would be affected by the deed: *Dutton* v. *Thompson*, 23 Ch. D. 278. Thus, where the Court was satisfied that the settlor, before executing the settlement, was well advised as to its effect, or sufficiently aware of its contents, the settlement has been upheld: *Toker* v. *Toker*, 3 De G. J. & S. 487; *Phillips* v. *Mullings*, L. R. 7 Ch. 244; *Hall* v. *Hall*, L. R. 8 Ch. 430; *Henry* v. *Armstrong*, 18 Ch. D. 668.

Impropriety of clauses.

The impropriety of the clauses will not be treated by the Court as a ground for upsetting voluntary settlements; for the Court has no jurisdiction to prescribe the terms upon which a man of capable understanding with full knowledge of their effect may dispose of his property: *Dutton* v. *Thompson*, 23 Ch. D. at p. 281; but such an impropriety merely tends to show, in the absence of evidence to the contrary, that the settlor did not in fact understand what he was doing, or what would be the effect of the settlement: *ibid.*, at p. 282. In the last mentioned case, *Cotton*, L. J., seems to suggest that this rule applies only in a case where the contest is between the settlor and the trustees; and that where it is between the settlor and persons claiming adversely to him it may be right to consider the question whether the settlement contained proper clauses, having regard to the position of the settlor: *ibid.*, at p. 283.

Onus on person impeaching settlement.

The onus of supporting a voluntary deed which is impeached is not thrown in every case upon the person whose interest it is to maintain it; but where the settlement was executed by a person of full age and of sound mind, and he comes (and especially if after a long interval) to have the deed set aside, he must prove some substantial reason for so doing: see *per Kay*, J., in *Henry* v. *Armstrong*, 18 Ch. D. 668; and see *Tucker* v. *Bennett*, 38 Ch. D. 109, in the case of a marriage settlement. See further as to the effect of gifts, &c., made under undue influence, the recent case of *Allcard* v. *Skinner*, 36

Voluntary Settlements.

Ch. D. 145, where the law on the point was reviewed by the Court of Appeal.

Trustee of voluntary settlement.

A person who accepts the office of trustee of a voluntary settlement incurs risks beyond those usually attaching to trustees. For where a settlement is impeached and set aside his position of trustee goes with it, and there is then no contract of trusteeship in existence under which he can claim his costs as of right. If, therefore, he unsuccessfully defends an action brought to impeach and set aside the settlement, he may, if the judge in his discretion so decide, not only not be allowed his costs but also be ordered to pay the costs of the action: *Dutton* v. *Thompson*, 23 Ch. D. 278; *Ex parte Russell, Re Butterworth*, 19 Ch. D. at p. 602; and in that case he would have no right to appeal merely on the question of costs, *ibid.;* and cf. *Turner* v. *Hancock*, 20 Ch. D. 303. But where a voluntary settlement has been established in an action and held valid, the trustees will not be deprived of their right to costs by reason of the settlement being subsequently invalidated under sect. 47 of the Bankruptcy Act, 1883, *Ex parte Official Receiver, Re Holden*, 20 Q. B. D. 43.

Liability for costs.

Covenants by voluntary settlor.

If the settlor intends to enter into covenants for title, he should convey as settlor to import the implied covenant for further assurance limited: see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, sect. 7 E.) In a voluntary conveyance other than a settlement, the covenants, if any, intended to be given, must be given in express terms. See further, as to covenants by settlors for title, *post*, pp. 216 *et seq.*

CHAPTER IV.

OF OBLIGATIONS TO SETTLE PROPERTY ARISING FROM CONTRACT OR OTHERWISE.

PAGE

1. MARRIAGE ARTICLES.
   Of Articles for a Settlement generally 195
   Of Executory Trusts 197
   Form of Articles for a Settlement—Statute of Frauds. 200
   What are "Usual Clauses" in Settlements 205

PAGE

2. RECTIFICATION OF MARRIAGE SETTLEMENTS 207
3. REPRESENTATIONS 211
4. WIFE'S EQUITY TO A SETTLEMENT 214

1. MARRIAGE ARTICLES.

Nature of Marriage Articles.

Of Articles for a Settlement generally.]—It happens occasionally that either through want of time, or for some other reason, a proper settlement is not executed before marriage, but articles of agreement are entered into by the parties which contemplate the subsequent execution of a formal settlement.

Where this course of proceeding is not necessitated by want of time, but is considered advisable having regard to the situation or condition of the property proposed to be settled, the various trusts and provisions intended to be adopted should be as full and detailed as the circumstances will permit, so as to prevent as far as possible any question arising as to the manner in which the settlement is to be framed.

Articles not to be construed with literal strictness.

But, as a general rule, such articles amount to little more than rough minutes or heads of instructions for a settlement, varying of course considerably in different cases in the number of contingencies provided for, and the more or less detailed character of the provisions introduced. Accordingly the Court has held that they are not to be construed literally (*Randall* v. *Willis*, 5 Ves. 275), nor in the same

Marriage Articles.

Agreement of limitations with articles if it fail to carry out intent immaterial.

manner as formal dispositions (*Taggart* v. *Taggart*, 1 Sch. & Lef. 84, 87), where such a reading would defeat the intention of the parties. And even where a postnuptial settlement purports to be made in pursuance of antenuptial articles, although the limitations in the settlement may agree with the wording of the articles, if it fail to carry out their intent, the Court will reform it. In arriving at what this intent really is, the Court is bound to have regard to the fact that they were entered into in contemplation of marriage, and ought to be so construed as to make the most effectual provision for the children of the marriage: *Cogan* v. *Duffield*, 2 Ch. D. 48. The Court in fact places itself in the position of a conveyancing counsel, and treats the articles as if they had been laid before it as instructions for preparing a settlement. And, bearing in mind the three main points to be looked to in a settlement, viz., the destination of the income, the mode in which the capital is to be limited to the children, and the way in which it is to go if there are no children who attain an indefeasible interest in it (per *Baggallay*, L. J. in *Cogan* v. *Duffield*, at p. 49), it will, upon any point where the articles are not clear and unequivocal, supplement them when deficient, and mould them when ambiguous, so as to produce what it considers as a proper form of settlement.

Approved mode of settling wife's fortune.

"The mode of settling a wife's fortune which is approved by the Court is to give her the first life interest for her separate use, then a life interest to the husband, then subject to powers given to husband and wife of appointing the fund among the issue of the marriage, it is given equally to such of the children as being sons attain twenty-one or being daughters attain that age or marry (*a*), or else to the children equally with gifts over in favour of the others, if any of them being sons die under twenty-

(*a*) This form was adopted by *Shadwell*, V.-C., in *Young* v. *Macintosh*, 13 Sim. 445, and preferred by *James*, L. J., in *Cogan* v. *Duffield*, 2 Ch. D. at p. 49, to the alternative form adopted by Lord *Redesdale* in *Taggart* v. *Taggart*, 1 Sch. & Lef. 84.

Marriage Articles.

one or being daughters die under that age and unmarried; if there is no child who being a son attains twenty-one, or being a daughter attains that age or marries, then, if the wife survives, the fund is limited to her, but if she dies in her husband's lifetime, she has a general power of appointment over it, and in default of any exercise of the power it is given to her next of kin as if she had died intestate and without having married:" per *Baggallay*, L. J. in *Cogan* v. *Duffield*, 2 Ch. D. 49.

Power of appointment.

In a later case of *Oliver* v. *Oliver*, 10 Ch. D. 765, *Fry*, J., in directing a settlement of property belonging to the wife omitted, with reluctance, a joint power of appointment to the husband and wife, not feeling himself empowered by the authorities to insert such a power, and limited an exclusive power of appointment among the children of the marriage to the wife alone. But in *Gowan* v. *Gowan*, 17 Ch. D. 778 (which see for form of order), *Jessel*, M. R., did not share the doubts of *Fry*, J., and referring to the already quoted statement in *Cogan* v. *Duffield*, *supra*, inserted in a settlement of a fund which had been directed to be settled on the wife and children of A. a joint power of appointment to A. and his wife.

In the recent case of *Re Parrott*, *Walter* v. *Parrott*, 33 Ch. D. 274, no power of appointment was introduced, but this was upon the ground that the will directing the settlement seemed to contemplate the omission of the power.

In matters executory Court will mould improper or informal expressions to carry out the intent.

Of Executory Trusts.]—In furtherance of the presumed intention to benefit the children, the Court has often construed limitations in articles in a different way from that in which it would have construed them had they been found in a more formal instrument.

"In matters executory, or in cases of articles, or a will directing a conveyance, where the words of the articles or will are improper or informal, the Court will not direct a conveyance according to such improper or informal expressions, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent

Marriage Articles.

of the parties": *Lord Stamford* v. *Hobart*, 3 Br. P. C. (Toml. ed.) at p. 33; and see *Lady Glenorchy* v. *Bosville*, Cas. temp. Talb. 3; S. C. 1 Wh. & Tud. L. C. Eq. 1. Thus it has read words as importing a tenancy in common, which, in deeds, or wills containing no direction to settle, would have been construed as creating a joint tenancy: *Taggart* v. *Taggart*, 1 Sch. & Lef. 84; *Mayn* v. *Mayn*, L. R. 5 Eq. 150. Again, where by a strict interpretation of the limitation the parent by the rule in *Shelley's case* (1 Co. Rep. 93), would have taken an immediate estate tail, and become thus able to defeat the whole object of the settlement, the limitation has been moulded so as to cut down the parents' estate to one for life only, with remainder to the children in strict settlement: *Trevor* v. *Trevor*, 1 P. Wms. 622; 5 Br. P. C. (Toml. ed.) 122; *Rochefort* v. *Fitzmaurice*, 2 Dr. & W. 1; *Lambert* v. *Peyton*, 8 H. L. C. 1; and see *Phillips* v. *James*, 3 De G. J. & S. 72.

Tenancy in common for joint tenancy.

Rule in *Shelley's Case* defeated.

Distinction between executory trusts in marriage articles and in wills.

The only distinction between executory trusts in marriage articles and in a will has been thus stated: "The object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and to appropriate the estate to himself. If therefore the agreement is to limit an estate for life with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement": per Sir Wm. *Grant*, M. R., *Blackburn* v. *Stables*, 2 V. & B. 367, 369.

Instance of strict construction of articles.

But where the estate tail, which would be limited by force of the rule to the first taker, could not be barred by such person, whether husband or wife, alone, but the concurrence of both husband and wife was necessary, the Court refused to depart from the very words of the articles in framing the settlement: *Honor* v. *Honor*, 1 P. Wms. 123. In that case the

Marriage Articles.

property belonging to the husband was by the articles agreed to be limited to the husband for life, with remainder to the wife for life, with remainder to the heirs of her body, and the estate so limited to the wife being an estate tail *ex provisione viri*, was as such incapable of being barred by the wife during coverture under 11 Hen. 7, c. 20. But this statute has now been repealed by 3 & 4 Wm. 4, c. 74, s. 17, save as to settlements made before the passing of the Act, and the exception to the general rule as to the construction of marriage articles is no longer part of the law: *per Sugden*, C., *Rochefort* v. *Fitzmaurice*, 2 Dr. & W. 1, 19.

Limitations to "heirs female of body," how construed.

A limitation in the articles of real property to be settled to the use of the heirs female of the body of the intended husband, will be treated as a limitation in favour of the daughters of the marriage, and will be carried into effect by a settlement upon them as tenants in common in tail, with cross remainders between them: *West* v. *Errissey*, 2 P. Wms. 349; *S. C.*, 1 Br. P. C. (Toml. ed.) 225. See *contra*, *Powell* v. *Price*, 2 P. Wms. 535; but in that case portions were by the articles expressly provided for daughters.

Word "issue," how construed.

In a covenant in marriage articles to settle, or make a settlement upon "the issue of the marriage," the word "issue" will be read as a word of purchase; and the direction will be carried into effect by making provision for the whole of the children of the marriage, by giving successive estates tail to the children of the marriage, *i.e.*, to the first and other sons successively according to seniority in tail, with remainder to the daughters as tenants in common in tail, with cross-remainders between them: *Dod* v. *Dod*, Ambl. 274; *Hart* v. *Middlehurst*, 3 Atk. 371; *Grier* v. *Grier*, L. R. 5 H. L. 688.

In *Cogan* v. *Duffield*, 2 Ch. D. 44, the articles only provided that the trusts of the income of the property which belonged to the wife should be for the benefit of wife and husband during their joint lives, and the trusts of the capital should be for and amongst the children according to the appointment of the husband and wife, or the survivor, and in default of appointment to the children equally; and

Marriage Articles.

in the event of there being no children, and the husband being the survivor, the trust property to be at his absolute disposal; and after the marriage a settlement was made containing a provision in a similar form. There was issue of the marriage one child only, who predeceased his father and died an infant; in an action brought by the wife after the death of her husband to rectify the settlement, the Court considered that if the action had been brought to execute a settlement in pursuance of the articles, it would have given the first life interest to the wife for her separate use, and have made the interest of the children contingent on attaining 21 (if sons) or attaining that age or marrying (if daughters), and would have limited the property to the wife in the event of no child taking a vested interest, and, the wife having survived her husband, ordered the settlement to be rectified upon that footing.

Where the limitations, if strictly followed by the deed of settlement, would be obnoxious to the rule against perpetuities, they will be moulded and carried out only so far as the rule will allow.

Form of Articles for a Settlement — Statute of Frauds.] — No particular form of instrument is essential to the validity of articles for a settlement; whether they be by bond, covenant, agreement, or otherwise, they will be equally capable of being enforced, provided that they satisfy the requirements of the Statute of Frauds (*b*). Notwithstanding that, according to the old law, marriage put an end to all previously existing bonds, covenants, and liabilities between husband and wife (see Co. Litt. 264 b), the Courts of Equity have repeatedly upheld, after marriage, agreements entered into by intending spouses alone, without the intervention of trustees, for the settlement of property: see *Haymer*

(*b*) A bond or covenant given by an intended husband to his intended wife or *vice versâ*, might be merely suspended during the marriage, but become enforceable after the death of the covenantor by the covenantee: *Acton* v. *Pierce*, 2 Vern. 480; *Cannel* v. *Buckle*, 2 P. Wms. 243; *Fitzgerald* v. *Fitzgerald*, L. R. 2 P. C. 83.

Marriage Articles.

v. *Haymer*, 2 Vent. 343; *Cannell* v. *Buckle*, 2 P. Wms. 244; *Acton* v. *Peirce*, 2 Vern. 480; *Watkyns* v. *Watkyns*, 2 Atk. 96; *Luders* v. *Anstey*, 4 Ves. 501. According to the usual practice, however, marriage articles are generally entered into with trustees: see Vaizey on Settlements, Vol. I. p. 124.

By sect. 4 of the Statute of Frauds (29 Car. 2, c. 3), it is enacted that,—

No action on agreement on consideration of marriage unless agreement be in writing and signed.

"No action shall be brought whereby to charge .... any person upon any agreement made upon consideration of marriage .... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be made in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

Meaning of words "upon consideration of marriage."

Agreements "upon consideration of marriage" mean agreements made in consideration of a marriage, which has already been agreed upon between the parties: *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Warden* v. *Jones*, 2 De G. & J. 76. Marriage is of itself a good consideration to support an agreement for a settlement, but it is not essential to the specific enforcement of such an agreement that such consideration should be expressly stated in the agreement, if sufficient proof of the consideration can be adduced *aliunde*, and provided, as it is conceived, that the case is taken out of the scope of the statute on the ground of fraud, or of part-performance: *Hammersley* v. *De Biel*, 12 Cl. & F. 45; and compare *Vincent* v. *Vincent*, 56 L. T. 243; *post*, p. 204.

Parol promise to settle void.

A parol agreement to make a settlement in consideration of marriage is utterly void: *Randall* v. *Morgan*, 12 Ves. at p. 73; see also *Re Rownson*, 29 Ch. D. 358. But a mere promise to marry will be valid though not in writing: *Cork* v. *Baker*, 1 Str. 34; *Harrison* v. *Cage*, Lord Raym. 386; *King* v. *Gillett*, 7 M. & W. 55. See Taylor on Evidence, 909.

Attempts have been made to bring parol promises to settle property in consideration of marriage on the ground of fraud or part performance out of the mischief of the statute (*c*).

(*c*) See as to fraud and part performance as regards agreements generally, sub tit. AGREEMENTS, *ante*, Vol. I. pp. 296 *et seq.*

Marriage Articles.

Fraud.

In a case where a wife unsuccessfully attempted to enforce a verbal promise by her husband to settle her property to her separate use, Lord *Parker*, C., is reported to have said:—"In cases of fraud, equity should relieve even against the words of the statute; as if one agreement in writing should be proposed and drawn and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve:" *Montacute* v. *Maxwell*, 1 P. Wms. at p. 620; see *S. C.* Prec. Ch. 526. But the Court will not readily presume fraud: *Warden* v. *Jones*, 2 De G. & J. 76. And there does not seem to be any reported decision where a parol promise to make a settlement has been supported on this ground.

Part performance.

Marriage is clearly not part performance of a parol promise to settle property: *Warden* v. *Jones*, 2 De G. & J. at p. 84; see also *Caton* v. *Caton*, L. R. 2 H. L. 127, and *Ungley* v. *Ungley*, 4 Ch. D. at p. 76. The giving of instructions to counsel to draw a settlement is not part performance: *Warden* v. *Jones*, *supra*; *Montacute* v. *Maxwell*, 1 P. Wms. 618; nor a will made pursuant to an ante-nuptial promise: *Caton* v. *Caton*, *supra*; nor payment of interest on a sum verbally agreed to be settled: *Re Gulliver*, 2 Jur. (N. S.) 700. In *Ex parte Whitehead*, 14 Q. B. D. 419, a husband in pursuance of a verbal agreement made on marriage allowed a sum of money belonging to his wife to remain on deposit at a bank, and she received the interest, and ultimately drew out the money; *Cave*, J., held that there had been no part performance so as to take the case out of the Statute of Frauds; but the Court of Appeal without deciding the question on the Statute held that there had been a gift of the money by the husband to the wife after marriage, and that it did not pass to the trustee in his liquidation.

Agreement partly performed must be part of arrangement for the marriage.

In order to enforce a parol agreement for a settlement on the ground of part performance, it must be shown that the agreement formed part of the arrangements on which the marriage took place, and was not a separate transaction: *per Romilly*, M.R., in *Goldicutt* v. *Townsend*, 28 Beav. 450.

As to what will amount to part performance of a

Marriage Articles.

parol promise to settle property, Lord *Cranworth*, C., said :—" Where one of the contracting parties agrees, as the consideration for the marriage, to do something more than marry, as to settle an estate, and in consideration of that promise the other party either acting for her or him contract to make a settlement, then the settlement made by the one contracting party is a good act of part performance :" *Warden* v. *Jones*, 2 De G. & J. at p. 84. His Lordship cited *Hammersley* v. *De Biel*, 12 Cl. & F. 45. See also *Surcome* v. *Pinniger*, 3 De G. M. & G. 571.

Part performance must be referable to agreement.

An act to be considered as part performance of a parol agreement must be such as is unequivocally referable to and done in pursuance of the agreement, and the terms of the agreement must be strictly made out : see *ante*, Vol. I., pp. 296 *et seq.* These rules apply to agreements for settlements in consideration of marriage equally with other agreements. Where a man, in consideration of his daughter's marriage, verbally promised to give her a house as a wedding present, and on the marriage he put his daughter and son-in-law in possession and they remained in possession till the death of the father intestate, it was held by the Court of Appeal (affirming the decision of *Malins*, V.-C., reported 4 Ch. D. 73), that the letting into possession was a sufficient part performance of the parol contract to take the case out of the Statute of Frauds, and that the son and daughter were entitled to retain possession of the house accordingly ; and further, that inasmuch as if a man agrees to settle a house in consideration of marriage he must be taken to mean free from incumbrances ; the sum of 110*l.* being balance of instalments due to a building society in respect of the house must be paid out of the intestate's estate : *Ungley* v. *Ungley*, 5 Ch. D. 887.

So also if, pursuant to an ante-nuptial promise, a fund is actually transferred before the marriage to trustees who hold it solely on the trusts agreed upon : *Cooper* v. *Wormald*, 27 Beav. 266. The Statute would, *à fortiori*, not be pleadable as a bar to a verbal promise for a settlement, if the occupying

Marriage Articles.

parties have paid rent and taxes or expended money in alterations and repairs in respect of the property: *Surcome* v. *Pinniger*, 3 De G. M. & G. at p. 575; see also *Coles* v. *Pilkington*, L. R. 19 Eq. 174; *Williams* v. *Evans*, *ibid.* 547.

Agreement must be complete.

Again, although the memorandum need not be of a formal character, it must be complete in its terms, or it will not be specifically enforced. "Part performance to take a case out of the Statute of Frauds always supposes a complete agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be done under the terms of the agreement, and by force of the agreement:" *per* Lord *Brougham* in *Lady Thynne* v. *Earl of Glengall*, 2 H. L. C. 158. The document should show on its face all the essential elements of a contract, *i.e.*, parties, subject-matter, agreement, and consideration.

Letters.

A valid promise to settle may be made by letters written in contemplation of marriage by one or other of the intending spouses: *Wankford* v. *Fotherley*, 2 Vern. 322; *Luders* v. *Anstey*, 4 Ves. 501; 5 Ves. 213; or by a father on treaty for his daughter's marriage: *Moore* v. *Hart*, 1 Vern. 110.

Signature of memorandum.

But no memorandum, however explicit and complete, even though it be in the handwriting of the person sought to be charged, will be effectual unless it is actually signed by him or his duly authorised agent: *Caton* v. *Caton*, L. R. 2 H. L. 127.

Solicitor's proposals for a settlement.

The authority of the agent is not required by the Statute to be in writing. But a memorandum of proposals for a settlement made by the solicitor of the father of a lady about to marry, though containing the name of the father written by the solicitor, was held not to bind the father as a contracting party: *Lady Thynne* v. *Earl of Glengall*, 2 H. L. C. 158; see also *Hart* v. *Middlehurst*, 3 Atk. at p. 378.

Consideration.

The memorandum must show on its face that the agreement was in consideration of marriage; it has been recently held by the Court of Appeal that it is not sufficient (except, as it would seem, where fraud or part-performance can be proved, see *ante*, p. 202)

Marriage Articles.

to show by parol that a marriage was in fact in contemplation between the parties: *Vincent* v. *Vincent*, 56 L. T. 243.

Post-nuptial memorandum of ante-nuptial parol agreement.

The question whether a post-nuptial note or memorandum in writing by the party chargeable, or his agent, of an ante-nuptial parol agreement for a settlement is sufficient to take the case out of the Statute of Frauds, has been the subject of much conflict of judicial opinion. The sufficiency of such notes has been maintained by decisions of Lord *Parker*, C., in *Montacute* v. *Maxwell*, 1 Str. 237; of Lord *Harcourt*, C., in *Hodgson* v. *Hutchinson*, 5 Vin. Ab. 522; of Lord *Hardwicke*, C., in *Taylor* v. *Beach*, 1 Ves. sen. 297, and in *Chilliner* v. *Chilliner*, 2 Ves. sen. 528; and of *Kindersley*, V.-C., in *Barkworth* v. *Young*, 4 Drew. 1; and also by *dicta* of Lord *Thurlow*, C., in *Dundas* v. *Dutens*, 1 Ves. jun. at p. 199; of Lord *Langdale*, M.R., in *De Biel* v. *Thompson*, 3 Beav. 475; of Lord *Cottenham*, C., in *S. C.* 12 Cl. & F. 64 n.; and *Turner*, L. J., in *Surcome* v. *Pinniger*, 3 De G. M. & G. at p. 575. The contrary opinion is supported by the decisions of Lord *Henley*, K., in *Spurgeon* v. *Collier*, 1 Eden, 55; and of Lord *Cottenham* in *Lassence* v. *Tierney*, 1 Mac. & G. 551; and by the opinions of Sir *W. Grant*, M.R., in *Randall* v. *Morgan*, 12 Ves. at p. 73; of Sir *T. Plumer*, M.R., in *Battersbee* v. *Farrington*, 1 Swanst. at p. 113; of *Romilly*, M.R., in *Warden* v. *Jones*, 23 Beav. 487, and *Goldicutt* v. *Townsend*, 28 Beav. 445; of Lord *Cranworth*, C., in *Warden* v. *Jones*, 2 De G. & J. at p. 85; and Lord *Selborne*, C., in *Codrington* v. *Lindsay*, L. R. 8 H. L. at p. 588. On the whole the weight of recent authority seems to be against the sufficiency of such post-nuptial notes or memoranda in writing. See Vaizey on Settlements, Vol. I., pp. 128 *et seq.*

Usual clauses.

What are "Usual Clauses" in Settlements.]— Articles often provide that the settlement to be executed in pursuance thereof shall contain all "the usual clauses," or "the usual and necessary clauses."

Investment, hotchpot, and advancement.

Such a definition would include clauses for investment, hotchpot and advancement. The provisions

Marriage Articles.

Maintenance, education, and accumulation now statutory.

Appointment, reimbursement and indemnity of trustees.

Powers of leasing, sale, and exchange.

for maintenance and education, and accumulation, which would have been formerly also included, are now incorporated by statute as well as the ordinary provisions for the appointment, reimbursement, and indemnity of trustees: see *post*, pp. 304 *et seq.*, 334 *et seq.* If the limitations contained in the articles were of such a character as to make the statutory provisions for maintenance and accumulation inapplicable, the existence of such a direction would authorise the insertion of express provisions in that behalf. Where the property to be settled is land, such a direction would have authorised the insertion of the usual powers of leasing, sale and exchange, and such other powers as are usual and necessary for the general management and better enjoyment of the property by all the parties interested: *Hill* v. *Hill*, 6 Sim. 136; *Duke of Bedford* v. *Marquis of Abercorn*, 1 My. & Cr. 312; *Scott* v. *Steward*, 27 Beav. 367.

Incorporated by Conveyancing Act, 1881, and Settled Land Act, 1882.

Now however, as a general rule, there is no advantage in inserting any such powers, as they will be incorporated by statute.

Powers of jointure—charging with portion—not included.

But powers of jointuring (*Hill* v. *Hill*, 6 Sim. 145), or of charging for portions (*Higginson* v. *Barneby*, 2 S. & St. 516), as tending to diminish the estate and being uncertain as to amount, would not be authorised by a provision in articles that the settlement shall contain the "usual clauses," or "usual and necessary clauses."

Result of omission to specify investment.

If the investments desired are not specified in the articles, the investment clause in the settlement would be limited to such only as are authorised for the investment of moneys under the control of the Court: see as to such investments, *post*, pp. 255 *et seq.*

Clause restraining anticipation.

Court in settling infant's property will insert it.

And also where adult, *semble*.

It does not seem settled whether a clause restraining anticipation would be included in the definition of usual clauses. The Court will direct the insertion of such a clause where it is settling an infant's property under its statutory authority. But in a case, where articles provided for the settlement of the property to the separate use of the wife, who was an adult, the Court refused to insert it: *Symonds* v. *Wilkes*, 12 W. R. 541; 13 W. R. 1026. Again, in the form of settlement stated as

Marriage Articles.

the approved form in *Cogan* v. *Duffield*, 2 Ch. D. 49, such a clause is not to be found. In the very recent case of *Re Parrott*, *Walter* v. *Parrott*, 33 Ch. D. 274, a testator bequeathed a sum of 10,000*l.* to his daughter then married, and directed the amount to be settled upon her for her life and to be invested in the names of two or more trustees, and at her death 8000*l.* of the above sum to be divided equally amongst her children and the remaining 2000*l.* to be given to her husband if living; if deceased, then the whole amount to be divided amongst her children: the Court of Appeal (reversing the decision of *Bacon*, V.-C.) held that a settlement ought to be made of the legacy, and that the life interest of the daughter ought to be for her separate use, with a restraint on anticipation. "The law would now give it to the wife's separate use, but I think that we ought to supplement this by introducing the restraint on dealing with it which is usual in settlements": per *Cotton*, L. J., *ibid.*, at p. 276. See as to the insertion of powers of appointment, *ante*, p. 197.

2. Rectification of Marriage Settlements.

Jurisdiction as to rectifying settlements, how exercised.

The rectification of settlements is one of the subject matters assigned to the Chancery Division of the High Court of Justice by the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 33. This jurisdiction is exercised by the Court not only in cases where there is a discrepancy between marriage articles and the formal instruments purporting to be executed in pursuance thereof: *Legg* v. *Goldwire*, Cas. temp. Talb. 20; S. C. 1 Wh. & Tud. L. C. 5 ed. p. 17; but also where by some error the settlement does not represent, or fails to carry out, the true intention of the parties: *Welman* v. *Welman*, 15 Ch. D. 570, 578.

In the former case, if the settlement is made after the marriage, it will be rectified so as to agree with the articles. But if the settlement is also made before the marriage, then, as a general rule, the

Rectification.

Court will treat the settlement as representing the ultimate agreement of the parties: *Legg* v. *Goldwire*, Cas. temp. Talb. 20. But if it purport to be made in pursuance of articles, or, even in the absence of any reference to the articles, if it be proved that it was intended to be in pursuance thereof, and that the discrepancy between the settlement as executed and the articles arose by mistake, the Court will rectify the settlement so as to make it conformable to the intention of the parties as shown by the articles: *Bold* v. *Hutchinson*, 5 De G. M. & G. 558.

Rectification on evidence of plaintiff alone.

The Court has in several instances rectified a settlement on the sole but uncontradicted evidence of the plaintiff, that the settlement, as executed, did not carry out the intention with which it was executed: *Smith* v. *Iliffe*, L. R. 20 Eq. 666; *Hanley* v. *Pearson*, 13 Ch. D. 545; *Cook* v. *Fearn*, 27 W. R. 212; *Edwards* v. *Bingham*, 28 W. R. 89; *Lovesy* v. *Smith*, 15 Ch. D. 655.

Thus where a settlement was executed after marriage in pursuance of and *in conformity with antenuptial articles* approved by the Court on behalf of its ward, and which limited the property of the ward, in default of issue of the marriage, and after the death of the survivor of her and her husband, as she should appoint by will, and in default of appointment to her next of kin; there was no issue of the marriage, and after the death of her husband, the widow brought an action to rectify the articles and settlement in such a way as that, in the event which had happened, the property should be hers absolutely; and on her uncontradicted evidence, that she had never intended that she should be deprived of all control over her property in the event of her being childless and a widow, the Court rectified the settlement as desired: *Smith* v. *Iliffe*, L. R. 20 Eq. 666 (*d*); and see *Wolterbeek* v. *Barrow*, 23 Beav. 423.

A settlement has been rectified by limiting an estate in fee simple in possession directly to the

(*d*) But this case has been disapproved of by the Court of Appeal in *Tucker* v. *Bennett*, 38 Ch. D. 1.

Rectification.

plaintiff who was equitable tenant for life in substitution for a limitation of a legal estate in remainder to her heirs, the effect of which, the legal estate in remainder not coalescing with the equitable life estate, would have been to prevent the application of the rule in *Shelley's Case*, and thus to have given her only an estate for life with remainder to her heirs as purchasers: *Hanley* v. *Pearson*, 13 Ch. D. 545; so also, by omitting a trust giving a moiety of the capital of the plaintiff's (the widow's) property to her husband: *Lovesy* v. *Smith*, 15 Ch. D. 655 (*e*); by striking out a clause restraining anticipation: *Torre* v. *Torre*, 1 Sm. & G. 518; by inserting a clause of hotchpot: *Wilkinson* v. *Nelson*, 7 Jur. (N. S.) 480. But the Court of Appeal recently refused to rectify a settlement by giving a testamentary power of appointment to the wife predeceasing her husband, and in default of issue, and an absolute trust in her favour if she survived her husband: *Tucker* v. *Bennett*, 38 Ch. D. 1, reversing the decision of *Kekewich*, J., reported 34 Ch. D. 754.

Settlement executed by husband under protest.

Romilly, M.R., held that a settlement executed by the husband before marriage under protest, as not being in conformity with the agreement, he reserving to himself the right of setting it aside, could not be rectified: *Eaton* v. *Bennett*, 34 Beav. 196.

Evidence of mistake.

The evidence of mistake, and of the nature of the mistake, must be unambiguous: *Marquis of Breadalbane* v. *Marquis of Chandos*, 2 My. & Cr. 711; *Elwes* v. *Elwes*, 2 Giff. 545; 3 De G. F. & J. 667; *Bradford* v. *Romney*, 30 Beav. 431. And must be clear and distinct, to show that there was some different intention at the time when the settlement was executed: *per Cotton*, L. J., *Tucker* v. *Bennett*, 38 Ch. D. at p. 15.

Concurrent mistake.

Where the Court is asked on the ground of mis-

(*e*) This case proceeded partly upon the principle that the husband, who was a solicitor and acted for his wife in the preparation of the settlement, was bound to point out to her in the clearest terms the nature of the provision in his favour; and see *Corley* v. *Lord Strafford*, 1 De G. & J. 238; *Clark* v. *Girdwood*, 7 Ch. D. 9.

Rectification.

take to rectify (as distinguished from setting aside) an instrument in some prescribed and definite mode, the mistake must be the concurrent mistake of all the settling parties; for it is not enough to prove that there was a mistake, but proof must be given of what was intended to be done, in order that the instrument as rectified may carry out the intention which the parties had down to the time of the execution of the deed; for "if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument:" per *Turner*, L. J., *Bentley* v. *Mackay*, 4 De G. F. & J. at p. 286; and see *Fowler* v. *Fowler*, 4 De G. & J. at p. 265; *Sells* v. *Sells*, 1 Dr. & Sm. 42; *Bradford* v. *Romney*, 30 Beav. 431; *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Tucker* v. *Bennett*, 38 Ch. D. 1; see also 1 Wh. & Tud. L. C. (6th ed.) p. 49.

But where the object of the rectification is to set aside the instrument *pro tanto* as against the party alleging the mistake, that rule would not seem to apply: per *Turner*, L. J., *Bentley* v. *Mackay*, at p. 287.

The Court does not apply to a provision in a marriage settlement, although of a voluntary character, the same rules as those upon which it acts in considering whether a voluntary deed is one which the settlor can set aside: per *Cotton*, L. J., *Tucker* v. *Bennett*, 38 Ch. D. at p. 10.

Delay in claiming rectification.

In *Wollaston* v. *Tribe*, L. R. 9 Eq. 44, and *Tucker* v. *Bennett*, 34 Ch. D. 754, 38 Ch. D. 1, the actions were brought for rectification ten and fourteen years respectively after the marriage, but in neither case did the Court hold the delay to be fatal, all the persons interested being in the same state as at the date of the settlement. But in the latter case, before the Court of Appeal, *Cotton*, L. J., after referring to *Wollaston* v. *Tribe*, the correctness of which decision he doubted, said that, with the exception of that case, "there is hardly a single case where many years after the settlement was executed, on mere parol evidence, uncontradicted because there was no one to contradict it, the Court has altered a deed be-

cause one of the parties afterwards desired that it should not stand as it was executed:" 38 Ch. D. at p. 15. Rectification.

The Court of Appeal also held in that case, reversing the decision of *Kekewich*, J., that a father living on affectionate terms with his daughter is her natural agent, so as to bind her by a settlement made on her behalf; and that it is no part of his duty when making such a settlement to see, either as regards the property which he is giving, or as regards her after-acquired property, that his daughter is separately represented. Father natural agent of child.

The Court there drew the distinction between the case of a father settling on his daughter's behalf the terms of a contract, and that of a child making a disposition in favour of a father, in which latter case the onus is thrown on the father of showing that the child was well advised and separately represented from the father: *ibid.* at p. 9.

The evidence should be contemporaneous with, or prior to, the execution of the deed: *Bradford* v. *Romney*, 30 Beav. 431. It may consist of letters: *Torre* v. *Torre*, 1 Sm. & G. 518; instructions for draft settlement; or may be parol: *Lackerstein* v. *Lackerstein*, 6 Jur. (N. S.) 1111. Evidence.

A settlement will not be decreed against purchasers for value without notice of the articles: *Powell* v. *Price*, 2 P. Wms. 535. *Contrà*, where the purchaser had such notice: *Davies* v. *Davies*, 4 Beav. 54. Purchaser for value without notice.

The onus lies on those who seek to alter an instrument to show why it should be altered, not on those who support it to show why it should not be altered: *Tucker* v. *Bennett*, 38 Ch. D. 1. Onus of proof.

3. Representations.

Many cases have occurred where representations have been made prior to marriage either by the intended husband, or by the father or mother or some friend of one of the intended spouses, upon the faith of which a marriage has been contracted. Representations as ground of obligation to make settlements.

Representations.

General rule.

The general rule laid down by Lord *Cottenham* in *De Beil* v. *Thompson,* 12 Cl. & F. 62 n., is that "a representation made by one party for the purpose of influencing the conduct of another, and acted on by that other, will in general be sufficient to entitle the party to whom it has been made to the assistance of the Court for the purpose of realising such representations." See also the observations of *Bacon,* V.-C., in *Dashwood* v. *Jermyn,* 12 Ch. D. at p. 781.

Estoppel by representation.

In other words, the Court holds that the party making the representations upon the faith of which another person acts and alters his position, cannot be permitted to deny the truth of his own representation. But this doctrine of estoppel by representation only applies where the representation is as to some particular fact, or state of circumstances which is alleged then to exist; for instance, a representation made to the intended husband by the father of the intended wife that certain property was settled upon her: *Prole* v. *Goady,* 2 Giff. 1; but it has no application to mere expressions of intention, or vague promises to do something in the future: see *per* Lord *Selborne,* C., in *Maddison* v. *Alderson,* 8 App. Cas. at p. 473. Thus, where an uncle wrote to his nephew a letter to be shown to the guardians of his nephew's intended wife, declining to settle his property, but stating that his will had been made, and that he had no intention of altering it, and that his Tipperary estates would go to his nephew at his (the uncle's) death, unless some unforeseen occurrence took place; a subsequent alteration of the will was held to give no claim against the uncle: *Maunsell* v. *White,* 4 H. L. C. 1039; *Jordan* v. *Money,* 5 H. L. C. 185; *Piggott* v. *Stratton,* 1 De G. F. & J. 33. Representations as to future intentions, or promises, to be binding upon the party making them, must amount to contracts: *per* Lord *Selborne,* C., in *Maddison* v. *Alderson, supra.*

Contracts must be in writing.

And it must be remembered that, having regard to sect. 4 of the Statute of Frauds (29 Car. 2, c. 3), these contracts must be in writing (see *ante,* p. 201); for parol contracts in consideration of marriage are,

Representations.

in the absence of fraud, or of part performance, of no validity, however binding in point of honour and morality: *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Lassence* v. *Tierney*, 1 Mac. & G. 551.

Marriage is not part performance.

Nor is marriage part performance of a parol contract; there must be some act in addition to the marriage, and the act must be attributable and referable wholly to the contract: *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Warden* v. *Jones*, 2 De G. & J. 76, 84; *De Beil* v. *Thompson*, 3 Beav. 469; *Ungley* v. *Ungley*, 4 Ch. D. 73; 5 Ch. D. 887.

Acquiescence.

In a very recent case it was held by *Cave*, J., that the action, or rather the inaction, of the husband for two years after marriage in allowing money, which was standing at the time of marriage to the credit of his wife, on deposit at a bank in her maiden name, to remain so deposited, and in allowing his wife from that time to receive the interest thereon, was not such part performance of a parol ante-nuptial agreement that the money should be her separate property, as to take it out of the Statute of Frauds. The Court of Appeal, while deciding in favour of the wife on another ground, declined to express an opinion either way upon the decision of *Cave*, J., on the point of part performance: *Re Whitehead*, 14 Q. B. D. 419.

Of what nature the representations must be.

The representations to be enforceable against the party making them must be distinct—without reserve or condition, and must not be waived by the party to whom they are made: *Caton* v. *Caton*, L. R. 2 H. L. 127; and if a settlement executed before marriage is inconsistent with the alleged representations, the former is assumed to be substituted for the latter: *Loxley* v. *Heath*, 1 De G. F. & J. 489; *Kingdon* v. *Tagert*, 17 Ch. D. 361; unless it be shown to the satisfaction of the Court that the settlement was so executed in error: *Bold* v. *Hutchinson*, 5 De G. M. & G. 558. And where a representation of fact had been made on behalf of an infant, and a settlement was executed in 1884 under the Infants' Settlement Act (23 & 24 Vict. c. 83), expressed to comprise property which had in fact been sold before that date, and was then represented by money

Representations.

standing in Court, although the deeds of settlement contained no general words sufficient to pass the money, the Court held that the husband and wife were precluded from setting up any title to the fund in Court adverse to that of the trustees of the settlement: *Mills* v. *Fox*, 37 Ch. D. 153.

Marriage must have taken place on faith of representations.

And the marriage must be proved to have taken place on the faith of those representations, and not to have been decided on independently of them: *Goldicutt* v. *Townsend*, 28 Beav. 445 (*f*).

Against whom representations enforced.

Representations have been enforced against a father or his representatives: *De Beil* v. *Thompson*, 3 Beav. 469; *Hammersley* v. *De Beil*, 12 Cl. & F. 45; *Laver* v. *Fielder*, 32 Beav. 1; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121; *Ungley* v. *Ungley*, 4 Ch. D. 73; 5 Ch. D. 887; against the husband: *Alt* v. *Alt*, 4 Giff. 84; the husband's representatives: *Gilchrist* v. *Herbert*, 20 W. R. 348; and against a trustee of a former settlement who refused to transfer: *Michell* v. *Malings*, Seton, 1222, Form 3.

4. Wife's Equity to a Settlement.

Effect of Married Women's Property Act, 1882.

The question as to a wife's equity to a settlement, where no settlement or agreement for a settlement of her property has been executed on her marriage, cannot now arise except in cases where the marriage and also the wife's title to property accrued prior to the 1st of January, 1883, the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). This subject has already been discussed, *ante*, sub. tit. "Acknowledgments," Vol. I., pp. 217 *et seq.* And it will in this place be neces-

(*f*) In the case of *Viret* v. *Viret*, 17 Ch. D. 360 n., where a gentleman the day before marriage wrote to the lady's solicitors: "In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to her fortune being settled upon herself subject to certain conditions," and without anything more being done, the marriage took place, *Malins*, V.-C., held that the marriage must be presumed to have taken place on the faith of the agreement contained in the letter, and that there must be the usual reference to chambers to approve a proper settlement.

Equity to Settlement.

sary only to notice some points which have been decided since that volume appeared.

Amount to be settled.

Where a wife claims her equity to a settlement, the amount to be settled is in the discretion of the Court, which will have regard to the circumstances of the particular case. Thus, although only a moiety of the wife's property is generally ordered to be settled, where the husband is actually insolvent, or unable to support his wife and children, or where he has been guilty of what may be termed "aggravated misconduct," the Court will direct a settlement of the whole fund: *per Stirling*, J., in *Reid* v. *Reid*, 33 Ch. D. at p. 223, referring to the observations of *Cairns*, L. J., in *Re Suggitt's Trusts*, L. R. 3 Ch. 215.

So the Court will sometimes settle the capital as well as the income of the property if it is small, and especially if the husband has already possessed himself of any part of the wife's property: *Boxall* v. *Boxall*, 27 Ch. D. 220; and see the orders of *Wood*, V.-C., in *Re Buster*, 11 June, 1859; and of *Jessel*, M.R., in *Re Craddock*, 6 November, 1875, both referred to in that case.

Priority.

In the recent case of *Re Briant, Poulter* v. *Shackell*, 39 Ch. D. 471, *Kay*, J., decided that the wife's equity, if asserted, takes priority over any right of retainer which may exist as against the husband, inasmuch as the claims of the husband, if there had been no debt from him, would have been subject to the wife's equity (*g*).

Procedure to enforce wife's equity.

The wife's equity to a settlement may now be most cheaply and expeditiously (as it is conceived) asserted by the procedure of originating summons under Order 55, rule 3, of the Rules of the Supreme Court. The wife may be made plaintiff, and the husband and his assignees, and the trustees, defendants. Or the trustees may be made plaintiffs either by themselves or jointly with the wife. This procedure does not deprive the trustees of their statutory right of paying the trust funds into Court: see *Re Parker's Trusts*, 58 L. J. Ch. 23.

(*g*) See this case, for order declaring form of settlement.

CHAPTER V.

AS TO THE MODES OF BRINGING INTO SETTLEMENT DIFFERENT KINDS OF PROPERTY (*a*).

	PAGE
1. REAL PROPERTY AND CHATTELS REAL.	
Freeholds Generally, and herein of Covenants for Title	216
Freeholds by Way of Real Settlement	223
Freeholds upon Trust for Sale	224
Copyholds	234
Leaseholds	236
2. PERSONAL PROPERTY.	
Mortgage Debts	237
Portions	238
Undivided Shares of Personalty, &c.	239
Corporeal Chattels	240
Stocks, Funds, Shares, and Securities	241
Debts	242
Reversionary Interests	244
Policies of Life Assurance	244

REAL PROPERTY AND CHATTELS REAL.

Real Property and Chattels Real.

Freeholds generally, and herein of Covenants for Title.]—Where the property proposed to be settled consists of real estate or chattels real, the mode of bringing it into settlement varies according to the nature of the property.

Modes by which freeholds are brought into settlement.

Freeholds of inheritance must be limited to the intended uses, or vested in the trustees, so as to subject them to the intended trusts, either by the settlement itself, or by a separate deed, as the case may require, as to which see *infra*. If the property stands limited to such uses as shall be appointed,

(*a*) This subject is more fully treated than considerations as to space will here permit in Vaizey on Settlements, vol. i., chap. v., s. 3. The Editor takes this opportunity of acknowledging the great help he has derived throughout this Dissertation, and particularly in the present chapter, by reference to this most able and lucid treatise. Many passages, however, which are in this chapter word for word identical with corresponding passages in that treatise, are taken (as is indicated by the notes in the treatise) from Vol. IX. of the first edition of this work.

the assurance will be effected by means of an exercise of the power, which is generally recited, and should be, in any case, expressly referred to in the assurance. If the settlor is absolutely seised in fee, he will convey the property to the intended uses or to the trustees in fee simple, according as the beneficiaries are intended to take legal or merely equitable estates. It would seem that no particular words are essential to the effectual transfer of property, provided the intention to convey it appears. The customary word for the assurance of freeholds is "grant": see 8 & 9 Vict. c. 106, s. 2; but the use of this word is rendered unnecessary by sect. 49 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 45), and since that Act came into operation the word "convey" has come into general use; this word, according to the strict interpretation of the Act, is the word which, on certain conditions, carries by implication the statutory covenants for title: see *ante*, sub. tit. "Purchase Deeds," Vol. V., pp. 222, *et seq.*

As to whether settlors should convey "as beneficial owners" or "as settlors."

There has been considerable diversity of opinion and practice among conveyancers as to what covenants for title should be entered into by settlors. The learned writers of Davidson Prec. Conv. (3rd Ed. Vol. III. pp. 59, 634) maintain that on the occasion of a settlement of real estate made on marriage, whether by way of strict settlement, or by way of conveyance on trust for sale, the husband or other grantor should enter into the usual covenants for title as on a sale, both because the marriage is a valuable consideration, and because it is advisable that future purchasers may have the benefit of full covenants for title up to the time of the settlement (*b*); and accordingly, the Precedent of a "Settlement on Marriage with the Usual Clauses" (Dav. Prec. Conv. 3rd Ed. Vol. III., Prec. xxxiii. at pp. 1026, *et seq.*) contains full covenants by the settlor for title extending to the acts of his "ancestors or

(*b*) As to covenants for title by a vendor claiming under a settlement, see *ante*, Vol. V. p. 216, note.

Real Property and Chattels Real.

testators;" and this view is apparently supported by Mr. Vaizey, in his Treatise on Settlements, Vol. I. pp. 320, 324; and accordingly in his Precedents of Settlements at pp. 2, 34, &c., the same learned writer makes settlors convey land "as beneficial owners," thereby implying full statutory covenants for title.

In the first edition of this work (Vol. IX. pp. 210, 467, &c.) full covenants for title by settlors are introduced, extending only to the acts of themselves and those deriving title from them, and not to the acts of their predecessors in title. And this practice is supported by the authority of Lord *St. Leonards*, who thus states his view of the rule on this point: "When a man marries, and puts his estate into settlement, he is never made to do more than covenant against his own acts and the acts of those claiming under him. If his title should prove infirm, it would be a family misfortune; but if he had warranted his title absolutely, he would be called upon to pay the value of his estates at the very moment that the means of payment, the estates themselves, were taken from him. The practice thus to limit liability would, of course, apply still more forcibly in the case of a relative of the husband's bringing his estate into settlement:" *Monypenny* v. *Monypenny*, 9 H. L. C. at p. 133. Mr. Vaizey in two instances (Precedents, pp. 23, 63), after making settlors convey "as beneficial owners," introduces clauses restricting the implied statutory covenants to the acts of the settlors themselves. Covenants thus restricted amount in effect to little, if anything, more than covenants against incumbrances made by the settlors, and for further assurance limited, the latter corresponding to the statutory covenant, which is alone implied in settlements by the statute where the conveyance is expressed to be "as settlor;" and such covenants are therefore not open to any serious objection; but see *infra*, p. 220, as to the conveyance by way of settlement of incumbered property.

On the other hand, in the Form of Settlement given in the Fourth Schedule to the Conveyancing

Real Property and Chattels Real.

and Real Property Act, 1881 (44 & 45 Vict. c. 41), the settlor is made merely to convey "as settlor;" and this practice is adopted by many of the leading conveyancers of the present day (*c*). And it is submitted that no draughtsman should, in a conveyance of real estate for the purpose of a settlement on marriage, make the settlor (whether being one of the intended spouses, or a stranger) convey "as beneficial owner" in the absence of express instructions to that effect, or, at all events, without calling his client's attention to the point; and that even then words should generally be introduced restricting the statutory covenants for title to the acts of the settlor and those deriving title under him.

Objections to making settlors convey "as beneficial owners."

The practice of inserting, or importing by implication, full and unqualified covenants for title on the part of settlors, appears to be open to the most serious objection. Where, on the occasion of a settlement on marriage, the settlor is a person other than one of the intended spouses, it is clearly unreasonable that he should be required absolutely to warrant the title to the property comprised in his gift, thereby rendering himself liable to make good the whole value of the property if the title should afterwards prove to be bad. And, even where the spouses themselves bring property into settlement, it is not, in the best interests of themselves and their issue, advisable to make them do more than convey "as settlors," or perhaps, if the circumstances so require, also enter into a covenant against their own incumbrances. If they enter into unqualified covenants for title, express or implied, then, if an incumbrance which had not been disclosed, and which may have been unknown at the time of the assurance, should subsequently be discovered, the trustees would be bound to sue the settlor, and if necessary, to take proceedings against him in bankruptcy, a course which might inflict the utmost

(*c*) See Key and Elphinstone, Prec. Conv., 2nd edit., vol. ii., p. 633; Prideaux Conv., 13th ed., vol. ii., pp. 251, 255, 263, 264, &c.; Wolstenholme and Turner, Conv. Acts, 4th ed. pp. 40, 310.

Real Property and Chattels Real.

hardship, and even ruin on the very persons to protect whose interests the settlement is made.

Proper course where the property is subject to a mortgage.

Where an estate intended to be brought into settlement is subject to a mortgage, if the settlor conveys "as beneficial owner," or enters into covenants for title extending to the acts of the person by whom the mortgage was created, without, in either case, excepting the incumbrance, he thereby renders himself liable to exonerate the estate; but where such is the intention, it seems the better course not to make the settlor enter into full covenants for title, whether unqualified or restricted, but to make him convey "as settlor" expressly noticing the mortgage, and, in a subsequent part of the deed, to introduce a covenant by the settlor to discharge the mortgage debt. If it be intended that the persons claiming under the settlement shall take the estate *cum onere*, then, if the mortgage was made by the settlor, the conveyance, whether he conveys "as settlor" or "as beneficial owner," should be expressly made subject to the mortgage, the effect of which will be that he will not be compellable to pay off the mortgage debt; if, however, the mortgage was made by a predecessor in title, it would seem that the settlor by being expressed to convey "as settlor" will be sufficiently protected, without any mention of the mortgage debt, from liability in respect thereof; but even in this case it is advisable in every way to express the conveyance to be made subject to the mortgage.

Covenants for title in voluntary settlements.

As regards settlements not made in consideration of marriage, *i.e.*, voluntary settlements, it is of course entirely in the settlor's option whether or not he will enter into full covenants for title, either with, or without qualification; but this consideration imposes special responsibility on his professional adviser, as to what covenants for title he may reasonably consent to submit to. As a general rule, it would seem that a voluntary settlor should be expressed to convey merely "as settlor;" and if circumstances should render it advisable to make him enter into full covenants for title, the liability thereby incurred should be fully explained to him.

Real Property and Chattels Real.

Of course, where land, the title to which is by descent, and well known to be satisfactory, is made the subject of a family settlement, there may be no objection to make the settlor carry on unbroken the chain of complete covenants for title. And in the case of a gift of land as a site for a public purpose, it seems just and reasonable that the settlor should by full covenants warrant the title to the property, which it is intended to build upon, or improve, by means of monies contributed by other persons. It is to be observed that in a voluntary assurance by way of settlement, not being "a conveyance for valuable consideration," it would be nugatory to express the settlor to convey "as beneficial owner," as the expression would not imply any covenants for title whatever.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 45) sect. 7, it is (among other things) enacted as follows (*d*) :—

Covenants for title to be implied.

"(1.) In a conveyance (*e*) there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject matter or share of subject matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say :

On settlement, for further assurance, limited.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor, namely :

(*d*) For other parts of this section set out in full and considered, see *ante*, sub tit. "PURCHASE DEEDS," Vol. V., pp. 218 *et seq.*

(*e*) By sect. 2 (v.) of this Act, for the purposes of this enactment, "Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property ; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance." And by sect. 7 (5) the term also "includes a deed conferring the right to admittance to copyhold or customary land."

Real Property and Chattels Real.

"That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to the conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required.

Benefit of implied covenants runs with land.

"(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person to whom that estate or interest is, for the whole or any part thereof from time to time vested.

Variation of statutory covenant.

"(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied and extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

"(8.) This section applies only to conveyances made after the commencement of this Act."

Extent of covenant implied by conveyance "as settlor."

On the above enactments, the following observations occur. The covenant implied by a conveyance as "settlor" is strictly confined to the acts of the settlor and those deriving title under him, and does not throw on him any liability for the acts of his predecessors in title. The implied covenant will bind the settlor to exercise a power, or execute any like assurance for perfecting the title; but if the property conveyed is a base fee, an express covenant should be inserted to execute every such disentailing deed as may be necessary to limit the fee simple in the manner intended: see *Davis* v. *Tollemache*, 2 Jur. N. S. 1181; *Bankes* v. *Small*, 36 Ch. D. 716. It is also to be observed that this implied covenant is merely for further assurance, and does not warrant the property to be free from incumbrances made either by the settlor himself, or by his predecessors in title. If in any case it is thought

advisable, a short covenant against incumbrances relating only to the acts of the settlor may be introduced at the end of the deed.

Who are the implied covenantees.

The persons with whom the implied covenants are deemed to be made in settlements are the trustees, as releasees to uses in the case of a strict settlement, or as grantees of the legal estate in the case of an assurance on trust for sale, or of any settlement giving to the beneficiaries only equitable interests.

Costs of further assurances.

The costs of any further assurances which may be necessary for confirming the settlement, are by the statute thrown on the persons deriving title thereunder. The fact that the covenantees are trustees affords no reason for departing from the ordinary practice with regard to covenants for further assurance, which throws upon the persons requiring assurances the expense of making them, because the expense so incurred would, of course, be allowed to the trustees as part of the trust expenditure; and to provide generally, that the assurances shall be at the cost of the trust estate, is wrong, because the benefit of the covenant may by means of a transfer from the trustees, have passed into other hands.

Covenants for title by married women.

Formerly, where, on a marriage, property was brought into settlement by the intended wife, it was often thought advisable not to insert in the assurance any covenants for title, because, if they were inserted, then, in the event of breach thereof, the husband was liable to be sued jointly with the wife during the coverture. Now, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sects. 14, 15, the husband's liability in respect of his wife's debts and contracts incurred or made before marriage is limited to the extent of any property which he shall have acquired or become entitled to from or through her, after deducting therefrom any payments *bonâ fide* recovered against him in respect of debts, etc., for which she was liable before marriage.

Freeholds by way of Real Settlement.]—Where the property proposed to be settled is freehold real

Real Property and Chattels Real.

estate, the mode of settlement will depend on the circumstances of the particular case.

Strict settlement.

As regards freeholds of inheritance, if the property be a family estate, and it is the intention of the parties to keep it in its condition as land for so long a time, and so far as, having regard to the Settled Land Acts, is possible, the property is then limited under what is called a "real settlement" to legal uses, *e.g.* (in the simplest form of settlement), uses giving an estate for life to the husband, followed by successive limitations in tail to the sons of the marriage, with remainder to the daughters as tenants in common in tail, with cross remainders in tail between them, with an ultimate limitation in fee simple to the settlor. Such a settlement will generally contain limitations to secure pin-money to the wife, and a jointure rent charge to her if she should survive her husband, and a limitation of a term to trustees to secure portions for younger children; also divers other provisions for the management of the estate except in so far as they have been rendered unnecessary by statutory enactments. This subject is treated of more at length under the heading of "Real Settlement," *infra*, Ch. VII.

Form of conveyance on trust for sale.

Freeholds upon Trust for Sale.]—Where there is no desire to keep the property in its actual condition, but at the same time there is no occasion for an immediate sale, the most convenient course is to effect the settlement by means of two separate deeds. The land is conveyed by one of these deeds to trustees to hold upon trust for the settlor till the marriage, and after the marriage upon trust for sale (*f*); as a general rule, the trust is to be carried into effect on the request of the husband and wife, who should both be parties to the deed of convey-

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Trust for sale exercisable without consent of adult beneficiaries.

(*f*) A trust for sale, unlike a mere power of sale, is not put an end to by all the beneficiaries becoming free from any legal disability and attaining vested interests, but is exercisable, unless the deed creating the trust otherwise directs, by the trustees alone without the concurrence of any of the beneficiaries: *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315.

ance, or of the survivor, and afterwards at the discretion of the trustees.

Conveyance by bargain and sale enrolled.

An expedient, formerly often adopted, where it was intended to sell the property in small parcels, was to make the conveyance by bargain and sale enrolled, in order that the enrolment, being matter of record, might be accessible to and used as evidence by the purchasers at large, without the production of the original: see Jarm. & Byth. Conv. (1st Ed.), Vol. IX. p. 259. The practice appears to be convenient as dispensing with the necessity of acknowledgments of the rights of purchasers to the production of the deed, but conveyances by deed of bargain and sale enrolled have become almost obsolete.

Form of conveyance of realty in trust for sale.

The conveyance is made in consideration of the then intended marriage, and it usually contains an express recital of the intended marriage, and should always do so where there are recitals showing the title of the settlor to the property proposed to be settled. If there are no recitals, then the consideration is stated in the operative part. The owner of the property should convey it to the trustees "as settlor," which has the effect of implying the statutory covenant for further assurance limited, see *ante*, pp. 217 *et seq.*

Powers of trustees for sale.

There is now no longer any necessity to express in detail the mode in which the trustees may sell the property. Sect. 35 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), gives to trustees, who are directed or empowered by their instruments of trust to sell, all the powers formerly given specifically, incidental to the due performance of such trust or power. This section enacts as follows:—

"(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to resell, without being answerable for any loss.

Real Property and Chattels Real.

"(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act."

Sale on depreciatory conditions.

This enactment gives a very large discretion to trustees, which must be exercised reasonably, and it was held prior to the Trustee Act, 1888, that a sale by them under unnecessary depreciatory conditions was a breach of trust, and would be restrained, and a contract made upon such conditions would not be specifically enforced: *Dance* v. *Goldingham*, L. R. 8 Ch. 902; *Dunn* v. *Flood*, 25 Ch. D. 629; affirmed. 28 Ch. D. 586. The Court, however, refused to interfere with a sale under a power on merely speculative evidence of an expected increase of value: *Thomas* v. *Williams*, 24 Ch. D. 558.

Interference by Court.

Duty of trustees for sale.

The duty of trustees for sale is to sell the estate in the manner most beneficial to the *cestuis qui trusts*, to receive the purchase money, and invest it properly. And if a higher price can be obtained by joining with the owner or owners of other property in selling both properties together, it is their duty to do so. On such a sale the purchase money must be apportioned before the completion of the purchase, and the purchaser will be bound to see that the apportioned part is paid to the trustees; and the trustees are the persons to decide, under proper advice, in a proper and reasonable manner, what is the share which is to be paid to them, and the proper mode of apportioning the prices of a life estate and reversion when sold together for one lump sum is to value both interests separately: *Re Cooper and Allen's Contract*, 4 Ch. D. 802, see at pp. 815, 818.

Discretion to postpone sale.

Where trustees with a trust for sale are at the same time invested with a discretionary power to postpone the sale, the Court will not interfere with their *bonâ fide* exercise of that discretion as to the mode or time of sale: *Re Blake, Jones* v. *Blake*,

29 Ch. D. 913; *Marquis of Camden* v. *Murray*, 16 Ch. D. 161. Real Property and Chattels Real.

But, for the future, trustees, and purchasers from them, are protected from the consequences that formerly attached to a sale under depreciatory conditions, by the Trustee Act, 1888, s. 3, which enacts:—

Depreciatory conditions on sales by trustees.

"3.—(1.) No sale made by a trustee shall be impeached by any cestui que trust upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate.

"(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it shall appear that such purchaser was acting in collusion with such trustee at the time when the contract for such sale was made.

"(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

"(4.) This section shall apply only to sales made after the passing of this Act."

But if it can be proved that in consequence of the depreciatory character of the conditions the property has been sold at an under value, the law remains as before. The protection given by this section seems however to be practically complete, because, except in the very rarest cases, it will be impossible to trace with certainty (and it is presumed that the words "unless it appears" will not be satisfied with anything short of irresistible or at least reasonable inference) any connection between the existence of the depreciatory conditions and the inadequacy of price.

See further as to the powers and duties of trustees for sale, *ante*, sub tit. "PURCHASE DEEDS" Vol. V., pp. 30 *et seq.*; see also Lewin on Trusts, Ch. XVIII., pp. 422, *et seq.*

Declaration of trust of proceeds of sale.

The trust for sale is immediately followed by a declaration by the trustees, that they will hold the proceeds of sale on the trusts declared thereof by an

Real Property and Chattels Real.

indenture of even date with the deed of conveyance, such indenture being the marriage settlement properly so called. In this manner the trusts of the settlement are kept off the title to the property; the trustees through their power of giving receipts, either statutory or expressed (*g*), are enabled to give valid discharges for the purchase money to the purchaser; and the deed of conveyance can be handed over to the purchaser without disclosing the trusts, or rendering it necessary that the right of the purchaser to production of the deed containing them should be acknowledged, while the latter deed being the deed of settlement of the proceeds of sale, is retained by the trustees.

Powers of management.

The deed of conveyance should also contain powers of management of the real estate until sale, which may be general or particular according as the parties desire. It is still necessary to introduce these powers, unless the sale is intended to be made almost immediately, inasmuch as the power of management given by the Conveyancing and Law of Real Property Act, 1881, s. 42 (see *post*, Ch. VII.), only arises where the person entitled to the possession (*h*) of land is an infant, and if a woman, unmarried.

Powers of leasing.

Express powers should also be given to the trustees until sale, of accepting surrenders of leases, and of granting leases of the property either simply for any term not exceeding twenty-one years, or, if the nature of the property renders it advisable, for longer terms on mining, building, or improving leases.

A deed creating a trust for sale is a "settlement."

A settlement by way of a conveyance on trust for sale is to be deemed a settlement under the Settled Land Act, 1882. By sect. 63 of that Act, it is enacted as follows :—

Provision for case of trust

"(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to sur-

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Receipt clauses.

(*g*) Express receipt clauses are not now generally inserted, but, if it is so desired a clause may be inserted giving a sole trustee power to receive and give effectual discharges for purchase-monies.

(*h*) "Possession" includes receipt of income, and "income" includes rents and profits. C. A. 1881, s. 2 (iii.).

to sell and re-invest in land.

render, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale (*i*) of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income (*k*) for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

"(2.) In every such case the provisions of this Act referring to a tenant for life (*l*), and to a settlement, and to settled land, shall

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(*i*) Where there was a devise of real estates upon trust for sale, with a direction that no sale should take place for twenty-one years after the date of the will, the rents until sale to be applied as the income of proceeds of sale, and the proceeds to be held in trust for the testator's children at twenty-one or marriage, until which time the income was to be applied for their maintenance, or accumulated for the benefit of the children; the will contained a declaration that for purposes of transmission the real estate should be impressed with the quality of personalty from the testator's death: it was held by the Court of Appeal that the estate could not be sold before the prescribed period either under this section or under sects. 58 or 59 of the Act, the children being in no way tenants for life within the meaning of the Act: *Re Horne's Settled Estate*, 39 Ch. D. 84.

(*k*) As to trusts for accumulation of income, see *post*, sub tit. "Wills," Vol. VII., pp. 447 *et seq.*

(*l*) In *Re Ridge, Hallard* v. *Moody*, 31 Ch. D. 504, a mining lease of lands held upon trust for sale was granted under the Act

Real Property and Chattels Real.

extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

"(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

"(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorised by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorised by this Act (*m*), be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

"(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled

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by a person entitled for life to the income of the proceeds of the sale of the land, and to the rents and profits until sale, it was held by the Court of Appeal that although that person could not strictly be said to be impeachable for waste, yet three-fourths of the rents and profits arising from the lease ought to be capitalised and one-fourth only of them ought to be paid to the tenant for life, as if she were so impeachable under sect. 11 of the Act.

(*m*) As to investment of capital monies arising under the Act, see *post*, Ch. VII.

land, and the income of such capital money and securities shall be paid or applied accordingly (*n*). Real Property and Chattels Real.

"(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging."

Amendment of this section by Settled Land Act, 1884, ss. 6, 7.

This section was not contained in the original draft of the bill, and was inserted when the bill was before a Select Committee in the House of Commons; it was intended to prevent settlors from evading the provisions of the Act, by making settlements by way of trust for sale. These provisions were however found to produce such serious practical inconvenience, that it was found necessary to modify them. And accordingly by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), it is enacted as follows:—

As to consents of tenants for life.

Sect. 6. "(1.) In the case of a settlement within the meaning of section 63 of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

"(2.) In the case of every other settlement, not within the meaning of section 63 of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section 56 of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act.

(*n*) As to the doctrine of constructive conversion of land into money and of money into land, see *post*, sub tit. "WILLS," Vol. VII., pp. 482 *et seq.*

Real Property and Chattels Real.

"(3.) This section applies to dealings before, as well as after, the passing of this Act."

Powers given by sect. 63 of Act of 1882 to be exercised only with leave of the Court.

Sect. 7. "With respect to the powers conferred by section 63 of the Act of 1882, the following provisions are to have effect:—

"(i.) Those powers are not to be exercised without the leave of the Court.

"(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

"(iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

"(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

"(v.) An order under this section may be registered and re-registered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as 'Trustees for the purposes of the Settled Land Act, 1882.'

"(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a *lis pendens*.

"(vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section 63 of the Act of 1882.

"(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

"(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section 63 of the Act of 1882, and shall have and may exercise those powers accordingly.

"(x.) This section is not to affect any dealing which has taken place before the passing of this Act under any trust or power to which this section applies." Real Property and Chattels Real.

Effect of enactments.

The effect of the enactments above set out, with regard to land settled upon trust for sale, appears to be as follows—

(1.) The statutory powers of leasing, exchange, partition, etc., and also of sale given by the Act of 1882, to tenants for life generally, are conferred upon the persons mentioned in sect. 63 of that Act; but such powers are latent and inoperative until made exerciseable by order of Court.

(2.) The powers of a tenant for life, when so made exerciseable, override any powers of dealing with the land which may have been expressly given to the trustees by the settlement, including their power of sale.

(3.) A purchaser from, or other person dealing with, the trustees will not be affected by the order until it has been registered as a *lis pendens;* if therefore he finds no *lis pendens* on the register he may safely complete his purchase or other dealing with the trustees.

(4.) The Order will describe the persons who are to exercise the statutory powers as tenants for life, and the trustees as "trustees of the settlement," and accordingly a person dealing with the tenants for life under the order, and obtaining the receipt in writing of the trustees for his consideration money, will be discharged from seeing to the application thereof; the trusts of the money are thus kept off the title to the land, even though such trusts are declared in the deed creating the trust for sale.

(5.) The Order being registered as a *lis pendens* against the trustees as "trustees for the purposes of the Settled Land Act, 1882," will not prejudice them as regards dealings with their own property.

(6.) Where an immediate sale is not contemplated, express powers of leasing, and (if the circumstances so require) of partition, exchange, and enfranchisement should be given to the trustees; as, otherwise, no dealings with the property, except by

Real Property and Chattels Real.

way of sale, will be possible, until an order making the powers of the tenants for life exercisable has been obtained.

(7.) Any such express powers or trusts created by the settlement (including these trusts of sale) will be exerciseable by the trustees without the consent of the tenants for life unless the settlement otherwise provides.

Appointment of new trustees.

The deed creating a trust for sale may contain a power of appointing new trustees; but now, having regard to the statutory power given by the Conveyancing and Law of Property Act, 1881, sect. 31, it is sufficient and usual merely to nominate some person or persons to exercise the statutory power of appointment.

Trustees for sale are "trustees of the settlement."

Inasmuch as the trustees under such an instrument are "trustees with power of sale of settled land," it is unnecessary to declare that they shall be trustees for the purposes of the Settled Land Acts, see sect. 2(8) of the Act of 1882.

Form of settlement of proceeds of sale of land conveyed on trust for sale by deed of even date therewith.

The deed declaring the trusts of the proceeds of the lands conveyed on trust for sale will be in form similar to an ordinary settlement of personalty (see *post*, Ch. VI.) with the addition of a declaration of trusts of the rents and profits of the land until sale, directing them to be applied in the same manner as the income of the proceeds of sale are applicable under the trusts of the settlement. Where land has been conveyed on trusts for sale, but no immediate sale is contemplated, it may often be convenient to insert in the deed of settlement a power to invest in the purchase of land, so as to enable the trustees to apply capital moneys in purchasing adjoining property, thereby enhancing the value of the estate. Clauses may also be introduced into the settlement modifying the provisions of the Settled Land Act, 1882, as regards the apportionment of mining rents, or the investment of capital moneys (see sects. 11, 20), or otherwise, as may be desired.

As to copyholds generally.

Copyholds.]—Where the property to be brought into settlement consists wholly, or in part, of copy-

holds, the usual practice is for the settlor, by the settlement itself, or by a separate deed (as the case may require), to covenant to surrender them to the use of the trustees to be holden of the lord of the manor by copy of court roll, according to the custom of the manor, and at the rents and subject to the services, etc., of right accustomed upon trust for sale. This covenant is followed by a declaration by the trustees that they will hold the proceeds of sale upon the trusts declared by the settlement, whereby the copyholds are thus assured, or by an indenture of even date, being the settlement properly so called. The title of the trustees is subsequently perfected by a surrender to the use of the trustees pursuant to the covenant, and by their admittance. To meet the contingency of delay in thus perfecting the title of the trustees, the settlor should, by the deed containing the covenant to surrender, declare that he holds the premises upon trust to surrender them pursuant to the covenant, and, until such surrender, upon the trusts of the settlement. The object of this declaration is to obviate any question arising whether the settlor would, in the absence of such a declaration, be deemed to be a trustee, and, also, to enable an order to be made under the Trustee Act, 1850 (13 & 14 Vict. c. 60), without the necessity of an action, to declare the settlor, or his heir, a trustee: see *Re Collingwood's Trusts*, 6 W. R. 536; *Re Cuming*, L. R., 5 Ch. 72. Sometimes the surrender precedes the settlement, but this course does not offer any advantage as against the more usual course. In such a case the settlement will recite the surrender instead of containing a covenant.

Strict settlement of copyholds.

If the copyholds are intended to be made subject to a real settlement (see *post*, Ch. VII.), the trusts will be declared by the same deed which contains the covenant for their surrender. If the lands form part of an estate which also comprises freeholds, all the property is usually settled by the same deed, and the trusts of the copyholds will be declared by reference; that is to say, the settlor covenants to surrender the copyholds to the use of the trustees upon trusts corresponding to the uses

Real Property and Chattels Real.

limited of the freeholds so far as the difference of tenure and the rules of law and equity will permit.

Creation of trust for sale of copyholds.

But where copyholds are not intended to be retained in their actual condition, they are generally brought into settlement, like freeholds, by means of two deeds. The first of these deeds will contain a covenant by the settlor, in case the intended marriage shall take place, to surrender the copyholds to the trustees (or a recital of the surrender, as the case may be), a declaration of trust till surrender as above stated, and any powers of management, &c., and other provisions which may be thought advisable as in the case of the creation of a trust for sale of freeholds: see *ante*, pp. 224 *et seq.* The second of these deeds will declare the trusts of the proceeds of sale by way of personal settlement: see *ante*, p. 234.

Conveyance of leaseholds on trust for sale and settlement of proceeds of sale.

Leaseholds.]—Leasehold property, if brought into settlement alone, is as a general rule conveyed to trustees upon trust for sale, and the remarks before made with reference to freeholds, apply equally to leaseholds. The leasehold parcels are assigned by the owner "as settlor" to the trustees, to hold subject to the rent and covenants subject to which they were theretofore held by the settlor, upon trusts similar to those already mentioned with reference to the freehold real estate. The deed of assignment contains a clause indemnifying the trustees against all liability in respect of the rent and covenants, as well as such powers of management, &c., and other provisions which may be thought advisable, as in the case of the creation of a trust for sale of freeholds: see *ante*, pp. 224 *et seq.* The trusts of the proceeds of sale are usually declared by a separate deed by way of personal settlement: see *ante*, p. 234.

As to making the settlement by way of demise.

Where the leaseholds about to be settled are subject to a rent and covenants of an onerous nature, it may be advisable to assure them by way of underlease, in order to exempt the trustees from the liability which they would incur by taking an assignment; but this is a practice not proper for universal

Real Property and Chattels Real.

and indiscriminate adoption, being productive of inconveniences, which indeed may be outweighed by the propriety of protecting the trustees, but ought not to be incurred without occasion. Whenever a settlement is by way of demise, it should be distinctly shown that the rent and covenants of the lease are to be paid and performed by the trustees, because, otherwise, there is ground to contend that they, as underlessees are entitled, as between themselves and the settlor or his representatives, to take the property free from the obligations of the lease, or in other words to save them harmless, under the implied warranty resulting from the words of demise, which is never the intention of the parties.

As to the settlement of leaseholds together with real estate, so as to subject them as far as may be to trusts corresponding to the uses declared of the settled freeholds, see *post*, Ch. VII.

2. Personal Property.

Mode of bringing a mortgage debt into settlement.

Mortgage Debts.]—Where a mortgage debt is proposed to be brought into settlement, the debt and the securities for the same are usually transferred by an independent deed to the persons who are to be the trustees of the settlement. "In making the assignment by a separate deed, an advantage is given to the mortgagor, by his being kept from being implicated with the trusts of the settlement, and by having the deed in his custody, which preserves the chain of the title, which he probably otherwise would not have; an advantage also is given to the persons interested in the settlement, from having the contents and operation of the settlement kept from the knowledge of the mortgagor and those claiming under him:" Butler's note xiv, 5, to Co. Litt. 290 b. A mortgagor is entitled on redemption to have not only his original mortgage, but all mesne transfers thereof delivered to him: *Capper* v. *Terrington*, 1 Coll. 103; and, accordingly, where several mortgage debts are intended to be comprised in a settlement each transfer should be effected by a separate deed.

This may be done by a deed to which the hus-

Personal Property.

band and wife are both parties, and which recites the intended marriage, or which, without any such recital, states in the operative part that the transfer is made in consideration of the intended marriage. This deed contains a declaration by the trustees that they hold the mortgage debt so assigned upon the trusts declared by the indenture of even date, *i.e.*, the settlement, but without showing any of the trusts. There should also be a power of appointing new trustees (unless the statutory power is relied on) corresponding to the power of appointment in the settlement so as to keep the titles to the mortgaged property, and the settled funds distinct.

Sometimes the mortgage debt is transferred to the trustees, not in that capacity, but merely as individuals. The deed then only contains a recital that the individuals named have become entitled in equity as well as at law to the principal sum, as in the case of a transfer on the appointment of new trustees. By this means all reference to the settlement, and to the fact that the transferees are trustees, is avoided.

Portions, how raisable.

Portions.]—Portions charged on real estate are, in a similar manner, brought into settlement by means of two or more deeds. Portions arise under an existing real settlement by virtue of provisions therein contained, that is to say, by virtue of either (1) a power for the tenant for life in possession to charge the settled lands with portions not exceeding a specified amount in favour of his younger children, or (2) a trust to raise for such portions a specified amount, or an amount varying with the number of younger children, secured by a term of years in the settled lands vested in the trustees by the settlement upon appropriate trusts for raising the money; in the latter case, it is generally declared that the trustees shall hold the monies so raised upon trust for the younger children as the tenant for life shall appoint, and, in default of appointment, in equal shares (*o*).

Mode of

Where, therefore, there is a tenant for life with a

(*o*) See, as to powers of charging portions, and trusts of terms for raising portions, *post*, Ch. VII., pp. 403 *et seq.*

power of charging portions, or of appointing a share in the portion-fund already created by the original settlement, and it is desired to settle a portion or share, it is, in the first place, necessary that the tenant for life should exercise his power. Sometimes the money is directed to be paid over to the trustees of the marriage settlement immediately on the marriage, but generally it is made payable on the death of the tenant for life, or on some other future event, according to the terms of the power. Secondly, there must be an assignment by the person in whom, by virtue of the exercise of the power, the benefit of the portion, or share in the portion-fund, charged on the settled land is vested, to the trustees of the marriage settlement. The exercise of the power and the assignment may both be contained in the same deed, or may respectively be effected by separate deeds; but the latter course seems preferable. The two matters are distinct, and a single instrument containing them would be separately and distinctly chargeable with stamp duty as two deeds: see Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 8. The charge or appointment forms part of the title to the settled lands charged, and the custody thereof necessarily belongs to the trustees of the real settlement, and may often be conveniently endorsed thereon; but the assignment is a matter which concerns not the trustees of the real settlement but the trustees of the marriage settlement, and ought properly to be delivered to the latter. Where a portionist takes in default of appointment, of course only one deed will be necessary, viz., the assignment, in order to vest his interest in the trustees of the marriage settlement. Thirdly, in every case there must be a separate deed declaring the trusts of the portion or share by way of personal settlement.

bringing portions into settlement.

Undivided Shares of Personalty, &c.]—Personalty, or shares therein, to which settlors are entitled under or in default of appointments, and the whole or part of residuary estates derived under wills or intestacies, are frequently the subject of personal settlements.

Settlement of undivided shares on residue.

Personal Property.

In order to bring into settlement, and to settle property of this nature, only one deed is generally required. The nature and extent of the settlor's interest, and the manner in which his title accrues, should be fully shown by means of recitals, so as the better to enable the trustees of the intended settlement to identify and obtain possession of the property. The interest of the settlor is then assigned to the trustees; and in so doing care must be taken, where a share is assigned, correctly to describe the whole fund, of which such share forms a part, and also to provide for the contingency of a diminution of the share, by reason of other participants in the fund coming into existence, or, on the other hand, for the contingency (if so intended) of an increase in the proportionate amount of the share, by gift or devolution of the whole, or an aliquot part of the share of a person previously entitled: see as to this, *Parkinson* v. *Dashwood*, 30 Beav. 49; *Edwards* v. *Broughton*, 32 Beav. 667. Notice of the assignment should be given to the trustees of the settlement or will under which the interest is derived.

Responsibility of trustees carrying on a business.

If the interest brought into settlement consists of a business, or a share therein, the trust should not be undertaken without bearing in mind the liabilities of trustees carrying on business for the benefit of their *cestuis qui trust*. They will be personally liable to the creditors: *Ex parte Richardson*, 1 Buck. 209; *Ex parte Garland*, 10 Ves. at p. 120; and see *ante*, sub tit. "PARTNERSHIP," Vol. IV., p. 420, n.; the creditors have no right to recover their debts out of the trust funds: *Strickland* v. *Symons*, 26 Ch. D. 245; except by means of, and to the extent of the right of the trustees to indemnity thereout: see *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548; *Re Gorton, Dowse* v. *Gorton*, 40 Ch. D. 536.

Settlement of chattels.

Corporeal Chattels.]—Personal chattels pass either by manual delivery or by deed; but assignment in writing is necessary where it is intended that the ownership shall vest in trustees, but that the beneficial enjoyment shall be subject to successive limitations. This assignment will be most conveniently

Personal Property.

effected by means of the deed of settlement, whereby the trusts of the chattels are declared.

Description of chattels.

A specific description of the settled chattels is not essential to the validity of the settlement; it will be sufficient to describe them as "all the household furniture," &c., in and about a particular house: *Dean* v. *Brown*, 5 B. & C. 336. But having regard to the questions likely to arise as to whether particular articles come within a general description (as to which see *post*, sub tit. "WILLS," Vol. VII., pp. 703 *et seq.*) it is better to give a particular enumeration of the chattels; and this may often be conveniently done by means of a schedule, to which the assignment will refer.

Substitution.

A clause may, if desired, be introduced into the settlement authorising the persons in possession to supply the place of the original articles by new ones of equal value.

Registration, whether necessary.

A settlement on marriage of chattels does not require registration as a bill of sale, being expressly excepted out of the operation of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), by sect. 4 thereof; but a voluntary settlement is not within the exception; see *Fowler* v. *Fowler*, 5 Jur. (N. S.) 99; *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510.

Possession of settled chattels is in the trustees.

Under such a settlement as above indicated the possession of the chattels is deemed to be that of the trustees, and the creditors of the husband cannot seize the chattels in execution (*Dean* v. *Brown*, 5 B. & C. 336), or claim them on his bankruptcy as being in his order and disposition: *Jarman* v. *Woolston*, 3 T. R. 618; *Haselinton* v. *Gill*, ib. 620, n.; *Ex parte Massey*, 2 Mont. & A. 173; *Gardner* v. *Rowe*, 5 Russ. 258.

As to the settlement of chattels as heirlooms to go as far as may be with real estate in strict settlement, see *post*, Ch. VII.

Stocks in public funds.

Stocks, Funds, Shares, and Securities.]—Stock in the Funds of the Governments of the United Kingdom, and of British India, and of some Colonial Governments, and also Stock of the Metropolitan Board of Works (now superseded by the London County

Personal Property.

Council), and some Municipal Stocks, pass by transfer in the books of the Bank of England. Such stocks are usually transferred to the trustees of the intended settlement before its execution, and the fact of the transfer is recited in that deed. Otherwise, the intention to make such transfer will be recited, and the transfer should be effected as soon as possible.

Shares, &c., in public companies.

Stocks and shares in joint-stock companies are transferred in accordance with the rules of the particular company, by deed, or writing not under seal, or otherwise, and the transfer is generally registered in the books of the company. Such shares are "things in action," so as to be excepted from the order and disposition clause of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 44 (iii.): *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

Securities passing by delivery.

Bonds, debentures, and other securities, and scrip certificates, which pass by delivery, should be delivered to the trustees before the execution of the settlement, which should recite the fact of delivery. Such investments of settled funds are open to serious objections, owing to the risk of their being abstracted, and coming into the hands of a holder for value without notice of the trust.

Debts.]—If a debt is brought into settlement it should be assigned to the trustees; no particular words are necessary for the assignment: *Row* v. *Dawson*, 1 Ves. sen. 331. Formerly a power of attorney was necessary to enable the assignee of a debt or other chose in action to sue for the debt at law, but by the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25 (6), the insertion of such a power is rendered generally unnecessary, provided "express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action" (*p*). Sometimes,

(*p*) This enactment applies only to *absolute* assignments, see *ante*, sub tit. "MORTGAGES," Vol. III., p. 819. An assignment to trustees on trust for the assignor for life, with remainders over is an "absolute assignment" within the meaning of this enactment: *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

Personal Property.

however, as when a foreign chose in action is settled, it may be advisable to insert a power of attorney. In such a case, a power of appointing substitutes may be found useful, with a view to the appointment of new trustees; but on transferring a chose in action to new trustees, it is better not to complicate the deed of transfer, by exercising the power of substitution, if it can be avoided; if the constituent of the power is a party to the deed of appointment of new trustees, he may revoke his former power to the old trustees, and give a similar power to the new trustees.

Notice must be in writing.

To render the assignment perfect at law, the statute requires the notice to be in writing; a merely verbal notice is sufficient in order to gain or preserve priority, and to prevent the debtor from paying his original creditor after the assignment: *Tibbets* v. *George*, 5 Cab. & El. 107. But, independently of the statute, the notice should always be in writing, and an acknowledgment by the debtor of receipt of the notice should if possible be obtained, or, otherwise, a memorandum of the fact and date of the sending of the notice should be preserved.

To whom the notice should be given.

The notice should be given to the debtor himself and not to his solicitor; for though notice to an agent will generally bind the principal (*Re Hennessy*, 2 Dr. & W. 555), yet the debtor will only be bound by notice given to his solicitor, so far as the solicitor is the agent for the debtor for the purpose of accepting notice in the particular matter, which may turn out not to be the case: *Saffron Walden, &c., Building Soc.* v. *Rayner*, 14 Ch. D. 406; notice to a solicitor may also be invalidated by fraud on his part: *Cave* v. *Cave*, 15 Ch. D. 639.

Debt secured by bill of exchange.

If the debt is secured by a bill of exchange or promissory note, the security is itself a chattel, and must be delivered to the trustee: *Hornblower* v. *Proud*, 2 B. & Al. 327; for if the settlor is allowed to retain it, it will pass on his bankruptcy, if it be in his possession, order, or disposition in his trade or business, with consent of the true owner: 46 & 47 Vict. c. 52, sect. 44 (iii). Notice to the acceptor is, in such cases, unnecessary: *Ex parte Mowbray*,

Personal Property.

1 J. & W. 448; *Ex parte Price*, 3 M. D. & De G. 586.

Settlement of reversionary interests.

Reversionary Interests.]—A reversionary interest, being a chose in action, is brought into settlement by means of an assignment to the trustees of the intended settlement, who should perfect their title by giving notice of the assignment to the trustees of the settlement or will, under which the interest is derived. The nature and extent of the interest and the title of the settlor should be shown by means of recitals. Settlements of reversionary interests are not within the rule that dealings with reversions by expectant heirs are to be regarded with suspicion: *Shafto* v. *Adams*, 4 Giff. 492.

Mode of settling life policies.

Policies of Life Assurance.]—A very frequent subject of settlement is a policy of assurance, generally on the life of the husband. The policy is either taken out by the husband before the marriage and assigned to the trustees by the instrument of settlement, and the trusts declared of the policy monies, or else the policy is effected in the names of the trustees and then the assignment is omitted, and the settlement only declares the trusts of the policy monies.

Insurable interest.

By the stat. 14 Geo. 3, c. 48 (set out *ante*, sub tit. "Mortgages," Vol. III. p. 827), it is provided that no life insurance shall be valid unless the assured has an insurable interest; that the names of the persons interested shall be inserted in the policy; and that no greater sum shall be recoverable than the value of the interest (*q*). It has been decided that every one has an insurable interest within the meaning of the statute in his own life: *Wainwright* v. *Bland*, 1 M. & W. 32; *Ashley* v. *Ashley*, 3 Sim. 149. In order to support an assurance on the life of another person, a pecuniary interest must be shown: *Halford* v. *Kymer*, 10 B. & C. 725. But

(*q*) This enactment is extended to Ireland by the 29 & 30 Vict. c. 42.

Personal Property.

an interest as trustee is sufficient to support the validity of a policy: *Tidswell* v. *Ankerstein*, Peake, N. P. Ca. 151; see *Ex parte Houghton*, 17 Ves. 253; *Phillips* v. *Phillips*, Kay, 40; *Collett* v. *Morrison*, 9 Hare, 162.

Advantages of different modes of settlement.

Both the modes above indicated of bringing into settlement life policies are equally valid and effectual. If the policy is taken out in the name of the husband, the trustees have the advantage of his admission that he has notice of the conditions on which the policy is granted (*r*), and of his covenants for title implied by his assignment of the policy as beneficial owner. If, on the other hand, the policy is taken out in the names of the trustees, there will be no need of any assignment, or of giving notice to the Office (as to which see *infra*), and moreover, the risk of forfeiture by reason of the death of the assured by his own act may be diminished (*s*).

Bonuses.

An assignment of the sum assured, as well as of the policy, will carry bonuses though not mentioned: *Courtney* v. *Ferrers*, 1 Sim. 137; *Parkes* v. *Bott*, 9 Sim. 388; *Roberts* v. *Edwards*, 33 Beav. 259. It is, however, advisable, that bonuses should be expressly either included in, or excepted from the assignment.

Notice of assignment.

If the policy is taken out in the name of the *husband*, notice in writing of the date and purport of the assignment must be given to the Office, and a statutory receipt of the notice must be obtained, for which a fee of 5*s*. is payable. The Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), passed on the 20th August, 1867, after reciting that "it is expedient to enable assignees of policies

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(*r*) As to importance of showing that the person whose life is assured has notice of the terms of the policy, see *Vyse* v. *Wakefield*, 6 M. & W. 442.

(*s*) Where a policy is effected on the life of a nominee of the grantee of the policy, it is usual to omit the provision avoiding the policy in case of death by suicide, at all events, if the suicide is committed during insanity: see Bunyon, pp. 74, 75. But in each case the conditions on which the policy will be issued should be ascertained before the assurance is effected.

Personal Property.

to sue thereon in their own names," enacts as follows :—

Assignees of life policies may sue in their own names.

"(1.) Any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for monies thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such monies.

Notice of assignment to be given.

"(3.) No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the monies assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England or Scotland or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed.

Assignment by indorsement or separate instrument.

"(5.) Any such assignment may be made either by indorsement on the policy or by a separate instrument in the words or to the effect set forth in the schedule hereto, such indorsement or separate instrument being duly stamped.

Notices of assignment to be acknowledged.

"(6.) Every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case of a fee not exceeding 5*s.*, deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company whose acknowledgment the same purports to be, shall be conclusive evidence as against such assurance company of their having duly received the notice to which such acknowledgment relates."

The form of assignment of a policy of life assurance given in the Schedule to the Act is as follows :—

Form of assignment.

"I, A.B., of, &c., in consideration of ——, do hereby assign unto C.D., of, &c., his executors, administrators, and assigns, the [*within*] policy of assurance, granted, &c. [*here describe the policy*]. In witness, &c.

Assurance company not trustee of policy monies.

An assurance company is not a trustee of the policy-monies, but a debtor, and accordingly has no right to pay the monies into Court under the Trustee Relief Act in cases where there are conflicting claims: *Matthew* v. *The Northern Assurance Co.*, 9 Ch. D. 80; *Re Sutton's Trusts*, 12 Ch. D. 175. But if the assignee presents a petition under that Act, asking for payment out, he must be taken as submitting to the jurisdiction under that Act: *Re Haycock's Policy*, 1 Ch. D. 611; *Re Sutton's Trusts, supra.*

Effect of clause in policy prohibiting assignment.

In the late case of *Re Turcan*, 40 Ch. D. 5, before the Court of Appeal, an assurance company had inserted a clause in the policy that the policy should not be assignable. The Court held that this provision was introduced merely to meet the new rights acquired by assignees under the Policies of Assurance Act, 1867, of suing the company in their own names, by providing that, notwithstanding that Act, the only persons to be recognised by the company were the representatives of the assured, but that it did not prevent the assured from assigning all his equitable interest in the policy. The policy in that case had the usual clause providing that the company should not be affected by notice of any trust, or charge, or lien, but it would appear that, even without that clause, the decision would have been the same.

Power of attorney unnecessary.

The Act above referred to, by enabling the assignee of a policy to sue at law in his own name, has entirely done away with the necessity of inserting a power of attorney in the assignment. And the statutory power of trustees to give receipts (as to which see *post*, p. 335) has superseded the practice of inserting express authorities so to do.

Personal Property.

Power to reduce policy.

Sometimes the settlement contains a power for the person whose life is assured to redeem the policy, on payment to the trustees of a sum equal to the amount assured.

Declaration of trusts of policy monies by reference.

When, as is generally the case, a life policy is settled together with other property, the trusts of the money payable under the policy may be conveniently declared by reference to the trusts of the other property. If the other property is settled by the wife, and the husband only brings into settlement a policy on his own life, the reference must generally be subject to exceptions as regards the limitation of the first life interest, and the ultimate trusts in default of children.

vnants itle.

When life policies are settled on marriage, it is usual to require the person whose life is assured, who is most frequently the husband, to enter into certain covenants in relation thereto. If the policy is assigned to the trustees, the settlor is usually expressed to convey "as beneficial owner," thereby impliedly, by virtue of sect. 7, subsect. 1 (A) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), covenanting that the policy is valid, that he has right to convey it, that it is free from incumbrances, and for further assurance (*t*).

Covenants as to keeping up policies.

The settlement of the policy should, in all cases, contain express covenants by the person whose life is assured with the trustees to the effect that he will not do or suffer anything to vitiate the policy, or whereby the trustees may be prevented from receiving the monies payable thereunder; that he will restore it if it should become voidable, and effect, or enable the trustees to effect, a new policy in its stead, if it should become void, for the amount which would have been payable under the void policy if the covenantor had then died; and that he

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(*t*) It is obvious that the objections to full covenants for title on the part of settlors of realty (as to which see *ante*, pp. 217 *et seq.*) have little or no application to the case of an assignment of a policy effected immediately before the assignment, and as to the validity of which in the absence of misrepresentation by the settlor there can be no doubt.

Personal Property.

will regularly pay the premiums and deliver the receipts for the same to the trustees. The covenant not to do or suffer anything whereby the policy may be vitiated is necessary, as a mere affirmative covenant to keep up the policy is not broken by the covenantor's suicide, or travelling beyond the limits of Europe in contravention of the terms of the policy: *Dormay* v. *Borrodaile*, 5 C. B. 380; *S. C.*, 10 Beav. 335; *Vyse* v. *Wakefield*, 6 M. & W. 442. If a policy becomes void through the act or default of the covenantor, he will, if his life should be then uninsurable, be liable to the trustees in damages, to make good the amount which would have been payable under the assurance: *Re Arthur*, 14 Ch. D. 603.

Duties of trustees as to keeping up policies.

As to the duties of trustees as to keeping up policies of life assurance where the settlement contains no covenants by the settlor to do so, or where such covenants are not performed, and as to the reimbursement to trustees of monies expended by them for that purpose, see *post*, p. 347.

Protection of trustees.

It is usual to protect the trustees by inserting in the settlement a clause expressly exonerating them from obligation to enforce performance of the covenants to keep up the policy, or to keep it up themselves.

As to the settlement of policies effected under the Married Women's Property Act, 1882, see *ante*, p. 138.

Delivery of policy to trustees.

The policy should be delivered to the trustees of the settlement. Formerly this delivery was essential, as otherwise the policy, if retained by the settlor, would have been deemed to be in his order and disposition, and would have passed to his assignee in bankruptcy, but now this is no longer the case, for a policy being a "thing in action," is excepted from the operation of the "order and disposition clause" of the present Bankruptcy Act: see 46 & 47 Vict. c. 52, sect. 44 (iii.); see also *Ex parte Ibbetson*, 8 Ch. D. 519.

CHAPTER VI.

OF PERSONAL SETTLEMENTS.

PAGE

1. THE COMMENCEMENT—DATE—PARTIES—RECITALS. 250

2. THE TESTATUM — DECLARATION OF TRUSTS.
   - *Form of Testatum* 253
   - *Trusts till Marriage* 254

3. THE INVESTMENT OF TRUST FUNDS.
   - *Statutory Investments*..... 255
   - *Express Trusts for Investment*..... 264
   - *Duties and Liabilities of Trustees as to Investments* 270

4. TRUSTS FOR PAYMENT OF INCOME.
   - *Life Interest of Husband—Forfeiture on Alienation or Bankruptcy*..... 284
   - *Life Interest of Wife—Restraint on Anticipation* ... 290

5. PROVISIONS FOR CHILDREN AND ISSUE.
   - *Power to Appoint to Children, &c.* 299
   - *Trusts for Children in Default of Appointment*..... 303

PAGE

   - *Hotchpot Clause* 303
   - *Maintenance and Accumulation* 304
   - *Advancement* 311

6. ULTIMATE TRUSTS IN DEFAULT OF ISSUE. 315

7. COVENANTS TO SETTLE AFTER-ACQUIRED PROPERTY, &C.
   - *As to Property of Husband* 320
   - *As to Property of Wife* 321
   - *Nature and Extent of the Covenant* 323
   - *Form of the Covenant*..... 331
   - *Restrictions and Exceptions*. 332
   - *Power to Withdraw Funds from Settlement* 334

8. TRUSTEE CLAUSES.
   - *Trustees' Receipts* 335
   - *Appointment of New Trustees* 339
   - *Indemnity and Reimbursement of Trustees* 343
   - *Power for Trustees to Compound, &c.* 356

1. THE COMMEMCEMENT—DATE—PARTIES—RECITALS.

Commencement, &c.

Personal and real settlements.

THE form of the instrument by which a settlement is effected will next be discussed; and, for greater convenience, it is proposed in the first instance to treat of settlements of personal property as distinguished from instruments which are, strictly speaking, real settlements. Accordingly, while such provisions as are common to both forms of settlements will be noticed in the present chapter, the consideration of those provisions which relate exclu-

sively to real estate, as such, will be deferred till a later part of this Dissertation.

Commencement, &c.

Settlements are usually effected by means of indentures, *i.e.*, deeds expressed to be made between several parties, and commence with the words "This indenture," immediately followed by a statement of the date of the deed: for further information as to the commencement and date of deeds see *ante*, sub tit. "Purchase Deeds," Vol. V., pp. 115 *et seq.*

Commencement and date.

The introductory words and statement of the date in a settlement, as in any other indenture, is immediately followed by the names, addresses, and descriptions of the several parties. It is usual to make both the husband and wife parties to a marriage settlement, even though only one of them brings any property into settlement. Previously to 1883, it was necessary that a husband should consent to, or at all events have knowledge of a settlement made by the wife of her property in contemplation of marriage, as otherwise such a settlement would have the effect of excluding or curtailing his marital interest, and would, accordingly, be liable to be vacated: *Howard* v. *Hooker*, 2 Ch. Rep. 81; *S. C.*, 1 Eq. Ca. Abr. 59, pl. 1; *Carlton* v. *Earl of Dorset*, 2 Vern. 17; *S. C.*, 1 Eq. Ca. Abr. 59, pl. 3; see *Strathmore* v. *Bowes*, 1 Ves. jun. 28; *Ball* v. *Montgomery*, 2 Ves. jun. 194; *Downes* v. *Jennings*, 32 Beav. 290; *Chambers* v. *Crabbe*, 34 Beav. 457. But since the commencement of the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), fraud on marital rights can seldom be a ground for vacating a settlement, as under that Act the woman's property will remain hers to her separate use, after the marriage, and the only interests the husband can acquire therein seem to be his contingent interest in her personal estate in the event of her dying intestate: *Re Lambert's Estate, Stanton* v. *Lambert*, 39 Ch. D. 626; and, as it would seem, his contingent estate by the curtesy in her land, if any; see as to this, *post*, p. 365 *et seq.* It is, however, in all cases advisable that both the intending spouses should be parties to, and execute the settlement, so as to evidence their consent to the provisions therein

Parties to a marriage settlement.

Commencement, &c.

contained. All persons, other then the intending spouses, by whom property is settled or covenanted to be settled, as also the trustees, will be made parties.

Order of parties.

The order in which the parties are placed is not prescribed by any rule, but it is suggested, as a convenient mode of arrangement, that the proposed husband, even though he may not bring any property into settlement, should generally be the party of the first part, the proposed wife of the second part; the person or persons (if any) settling immediately or covenanting hereafter to settle property for the benefit of the intending spouses and issue, or one or more of them, should come next in order; and the trustees will be the parties of the last part. See further as to parties to deeds, and how they should be described, &c., *ante*, Vol. V., pp. 117 *et seq.*

The recitals.

The names, &c., of the parties will be followed by the recitals, if any. In many cases no recitals will be necessary, and the witnessing part will follow immediately after the parties.

Scope of recitals.

The recitals, where introduced, should be restricted to the purpose of shewing what the property intended to be settled is, and, if the property is not in the actual possession or under the immediate control of the settlor, the title of the settlor to it, and of stating (if it be the fact) the transfer or payment, or intended transfer or payment, of stock or shares or money to the trustees, or that a policy or policies of insurance has or have been effected in the names of the trustees, or as the case may require. If any such recitals are inserted the agreement for the marriage should also be recited; the position of this recital is a matter of indifference. In the precedents of some writers it is made the first recital, in those of others it is placed in order of date, or just before the witnessing part. In the subjoined precedents it forms the first recital, inasmuch as, forming as it does the basis for the whole settlement, it seems not unfitting that it should be the introductory recital.

Recital of agreement for the marriage.

Recital of intended covenants.

Should any covenants be intended to be intro-

duced into the settlement, it is advisable to recite the intention of the parties to enter into the covenants in general terms, *e. g.*, "to enter into the covenants hereinafter contained," and not to enter into details as to their objects; for in the event of there being any discrepancy between a recital and the operative part, the trustees will be placed in a position of difficulty, and an application to the Court may be rendered necessary. Commencement, &c.

The general rule is that where the operative part is clear and unambiguous, it will not be controlled by the recitals: *Dawes* v. *Tredwell*, 18 Ch. D. 334; *Ex parte Dawes, Re Moon*, 17 Q. B. D. at p. 286. But where the operative part is ambiguous, the recitals will be called in aid to explain the ambiguity; *Re De Ros' Trust, Hardwicke* v. *Wilmot*, 31 Ch. D. 81. But there may be many intermediate cases where trustees would find considerable difficulty in applying the general rule. Discrepancy between the recitals and the operative part.

A full consideration of the questions of the advisability of inserting recitals in deeds generally, and of their effect, contents, and form will be found, *ante*, Vol. V., pp. 128 *et seq.*

2. The Testatum—Declaration of Trusts.

The Testatum.]—By the witnessing part, which immediately follows the recitals, if any, or, otherwise, the statement of the names, &c., of the parties, the settlor, in consideration of the agreement for the marriage, and of the covenants and other reasons, included in the comprehensive term of "the premises," conveys or assigns to the trustees such property as has not been already actually conveyed or transferred, and such as can pass by conveyance or assignment, *e. g.*, a policy of insurance taken out by the settlor in his own name, a chose in action, or a life interest in possession or reversionary. If any part of the property to be settled consists of real estate, which is intended to be settled as personalty under the machinery of a conveyance upon trust for sale, the settlor should convey it to the trustees by a separate deed: see *ante*, p. 224; if it consists of a Form of *testatum*. Real estate upon trust for sale.

Testatum.

mortgage debt, the debt will be transferred by a separate deed: see *ante*, p. 237.

Fraud on marital rights.

In a settlement of property belonging to the wife, the assignment was formerly always expressly stated to be with the approbation of the intended husband. That statement, being introduced for the purpose of preventing any charge being thereafter made that the wife's assignment was a fraud on her husband's marital right (*Countess of Strathmore* v. *Bowes*, 1 Wh. & Tud. L. C. 5th ed., p. 446), has, since the Married Women's Property Act, 1882, which has destroyed the marital right, become strictly speaking unnecessary, but it is still usually inserted in practice. And, conversely, a settlement by a husband of his property is usually stated to be made with the approbation of the wife.

Implied covenant.

The settlor should as a general rule convey "as settlor," and not as "beneficial owner," so as to imply only the limited covenant; see Wolst. & Turn. Conv. Acts, 40; and see *ante*, pp. 219 *et seq.*

Declaration of trusts.

The deed then proceeds to declare the trusts upon which it is intended that the trustees shall hold the property which has become vested in them by any of the means aforesaid.

Where after execution of settlement the marriage is broken off.

Trusts till Marriage.]—The first trust should be for the settlor until the solemnisation of the marriage.

Where after the execution of a settlement in contemplation of a particular marriage, the marriage is broken off, it is open to the parties to revoke the deed of settlement, or to call upon the trustees to execute other deeds: *Page* v. *Horne*, 9 Beav. 570; and see *S. C.*, 11 Beav. 227, per Lord *Langdale*, at p. 235; *Thomas* v. *Brennan*, 15 L. J. Rep. (Ch.) 420; *Bond* v. *Walford*, 32 Ch. D. 238.

Where, after the execution of a settlement in consideration of a then intended marriage, which was abandoned, and the parties cohabited without marriage, and three children were born, *Pearson*, J., held that the marriage contract having been put an end to, the trusts declared after the solemnisation of the intended marriage had become inoperative, and ordered the trust fund to be paid or transferred by the trustees to the settlor: *Essery* v. *Cowlard*, 26 Ch. D. 191.

Testatum.

The Court will, however, look very closely into any transaction that raises an inference that an attempt has been made to revoke or defeat a settlement so that the marriage might take place without any valid settlement having been executed: *Page* v. *Horne*, 11 Beav. 227.

Design to revoke or defeat settlement.

Where the limitations of a settlement are so framed as to apply to the case of *any*, and not one particular, marriage, the settlement, assuming it to be complete, will be irrevocable: *Bill* v. *Cureton*, 2 My. & K. 503; and this rule will apply, notwithstanding that the settlement was in fact executed in contemplation of a definite marriage, which is not solemnised: *McDonnell* v. *Hesilrige*, 16 Beav. 346.

Settlement framed so as to apply to any and not the particular marriage irrevocable.

If a trust be declared for the settlor until the marriage, and by reason of the affinity of the parties or otherwise no legal marriage can be solemnised, as the event on which the subsequent trusts were to arise cannot occur, the original trust takes effect and the property belongs to the settlor: *Chapman* v. *Bradley*, 4 De G. J. & S. 71; *Pawson* v. *Brown*, 13 Ch. D. 202.

Where no legal marriage, property held in trust for settlor until marriage will belong to him.

3. The Investment of Trust Funds.

Trusts after marriage.

The trusts after the solemnisation of the marriage vary, of course, according to the circumstances of each case; and the order in which such trusts are introduced varies in different instruments.

Trusts for investments.

A very important trust is that for the investment of the trust funds, and here again as to the form of the investment clause no definite rule can be laid down. The precedents contain various forms, some of an extensive, others of a more or less restricted range.

Statutory investment.

Statutory Investments.]—Numerous investments have from time to time been authorised by different statutes, in any of which trustees may safely invest the trust funds. These statutory powers of investment are exerciseable not only where the settlement contains no express investment clause; but also, as supplemental powers, where the clause itself sanc-

Investment of Trust Funds.

tions a more restricted range of investments, and even where it expressly directs that no other investments shall be permitted : see *post*, p. 260.

Formerly a trustee in the absence of an express investment clause in the instrument creating the trust, was bound to invest only in government or bank annuities ; see *Trafford* v. *Bohm*, 3 Atk. 441.

Lord St. Leonard's Act.

By sect. 32 of the 22 & 23 Vict. c. 35 (Lord St. Leonard's Act, 1859, made retrospective by sect. 12 of the 23 & 24 Vict. c. 38), trustees were empowered, unless expressly forbidden by the instrument of trust,

Real securities.

to invest on real securities in any part of the United Kingdom (*a*), or in the stock of the Bank of England or Ireland, or on East India Stock.

East India stock.

By 30 & 31 Vict. c. 132, s. 1, the words "East India Stock" in the above section are to include not only the East India Stock existing previously to 13th August, 1859, but also East India Stock charged on the revenues of India, and created under and by virtue of any future Act or Acts (*b*) ; and every trustee, executor, or administrator is thereby authorised to invest any trust fund in his possession or under his control in such subsequently created East India Stock. And by sect. 2 a trustee, &c.,

Securities with interest guaranteed by parliament.

is authorised to invest "in any securities the interest of which is or shall be guaranteed by Parliament" to the same extent and in the same manner as he may invest such trust fund in the sections authorised by 22 & 23 Vict. c. 35.

Power to vary investments.

It was held by *Wood*, V.-C., in *Re Warde*, 2 J. & H. 191, that sect. 32 of Lord *St. Leonard's* Act referred only to those cases where the trustees had

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(*a*) The Act does not extend to Scotland, sect. 33. Owing to the difference of the law as relates to land in that country, it would not be advisable for trustees to invest on real property in Scotland : Lewin on Trusts, 8th Ed., 329.

(*b*) 32 & 33 Vict. c. 106, s. 16 ; 36 & 37 Vict. c. 32, s. 16 ; 37 Vict. c. 3, s. 17 ; 42 & 43 Vict. c. 60, s. 18 ; and by the Oude and Rohilcund Railway Purchase Act, 1888 (51 Vict. c. 5), s. 18, capital stock created thereunder is to be deemed "East India Stock" within 22 & 23 Vict. c. 35, s. 32 ; and is to be deemed "India Stock" within the India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73), anything in that Act to the contrary notwithstanding.

Investment of Trust Funds.

power, independently of the Act, to make *some* investments, and operated, but only in those cases, to enlarge the class of legitimate investments, and that as the trustee had in that case no power of varying any existing investment, the section did not apply. But see *Re Clergy Orphan Corporation*, L. R. 18 Eq. 280.

A power to convert existing investments was given by 23 & 24 Vict. c. 145, s. 25, but that enactment is repealed and its provisions have not been re-enacted: see *post*, p. 260.

General order for investment of cash under control of Court.

By sect. 10 of the stat. 23 & 24 Vict. c. 38, power was given to the Lord Chancellors of England and Ireland and certain other officials, with certain advice there specified, to make such general orders from time to time as to the investment of cash under the control of the Court, either in the Three per cent. Consolidated, or Reduced, or New Bank Annuities, or in such other stocks, funds, or securities as he or they shall with such advice or assistance see fit; and also to make such orders as he or they shall deem proper for the conversion of any Three per cent. Bank Annuities then standing or which might thereafter stand in the name of the Accountant General of the Court of Chancery (*c*) in trust in any cause or matter into any such other stocks, funds, or securities upon which by any such general order cash under the control of the Court might be invested. And by sect. 11 of the same Act it is enacted that:—

Power to trustees, &c., to invest on securities authorised by general order.

"When any such general order as aforesaid shall have been made it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds, or securities, or any of them, to invest such trust funds or any part thereof in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested."

General Orders, 1 Feb. 1861,

Under the powers of this Act several general orders have from time to time been issued, the first

(*c*) Now the Paymaster General: see stats. 35 & 36 Vict. c. 44; 38 & 39 Vict. c. 77, s. 30.

Investment of Trust Funds.

now Ord. XXII., r. 17, Rules of Supreme Court, 1883.

of which was dated the 1st of February, 1861, which was as follows: "Cash under the control of [or subject to the order of] the Court may be invested in Bank stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated, Reduced and New 3*l.* per cent. Annuities." A new order was made, being Rule 17 of Order XXII., Rules of Court, 1883, which remained in force till the 26th November, 1888 (*d*). On that date the Rule of the Supreme Court, November, 1888, giving a much wider range of investment, came into operation. This rule is to be cited (in the same manner as the rule for which it was substituted) as Order XXII., Rule 17, and directs as follows :—

1. "Cash under the control of or subject to the order of the Court may be invested in the following stocks, funds, or securities, namely :—

"Two-and-Three-Quarters per Cent. Consolidated Stock (to be called after the 5th of April, 1903, Two-and-a-Half per Cent. Consolidated Stock) :

"Consolidated Three Pounds per Cent. Annuities :

"Reduced Three Pounds per Cent. Annuities :

"Two Pounds Fifteen Shillings per Cent. Annuities :

"Two Pound Ten Shillings per Cent. Annuities :

"Local Loans Stock under the National Debt and Local Loans Act, 1887 :

"Exchequer Bills :

"Bank Stock :

"India Three-and-a-Half per Cent. Stock :

"India Three per Cent. Stock :

"India Guaranteed Railway Stocks or Shares, provided in each case that such stock or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment (*e*) :

(*d*) That order was identical with the above with the addition of the words in brackets.

(*e*) It may be questioned whether having regard to the provisions of sect. 10 of the stat. 23 & 24 Vict. c. 38 (*ante*, p. 257), the authorization of these *shares* was not *ultra vires*, and whether

Investment of Trust Funds.

"Stocks of Colonial Governments guaranteed by the Imperial Government:

"Mortgage of freehold and copyhold estates respectively in England and Wales:

"Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.:

"Three per Cent. Metropolitan Consolidated Stock:

"Debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares:

"Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment.

"2. This rule shall come into operation on the 26th of November, 1888, and may be cited as the Rule of the Supreme Court, November, 1888, or may be cited according to the heading thereof, with reference to the Rules of the Supreme Court, 1883."

Cash in Court in any cause or matter.

It has been held by the Court of Appeal that cash standing in Court in the name of the Accountant General (now Paymaster General) in any cause or matter, including money paid into Court under the Land Clauses Consolidation Act, was "cash under the control of the Court" within the meaning of 23 & 24 Vict. c. 38, s. 10, and the general order made thereunder: *Ex parte St. John Baptist College, Oxford, Re Metropolitan and District Railways Act*, 22 Ch. D. 93 (*f*), and in the same

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trustees could, under sect. 11 of the same Act, safely invest therein. But the point is not of much practical importance, as the only two Indian railways having guaranteed *shares* are clearly not suitable for trustees, as their shares are not fully paid up: see Ellis' Trustees' Guide to Investments, p. 20.

Another question which arises as to this class of investments is as to the meaning of the words "liable to be redeemed." Indian Guaranteed Railway Stocks are generally liable to be purchased by the Indian Government after the expiration of certain periods at market prices, and it seems doubtful whether this fact does not render such stocks redeemable.

On the whole trustees should be cautious as to investing in such stocks, except under the sanction of the Court.

(*f*) This decision overrules *Re Boyd's Settled Estates*, 21 W. R.

Investment of Trust Funds.

case that the words "East India Stock" in the order included 3½ per cent. stock created since the date of the order.

Money in Court under any Act.

Under the above order (now Order XXII., Rule 17) money paid into Court under the provisions of any Act may be invested in any of the securities specified in the order, notwithstanding that the Act under which it was paid in gives a narrower range: see *Jackson* v. *Tyas*, 52 L. J. Rep. (Ch.) 830, where *Pearson*, J., referring to *Ex parte St. John College* (*supra*), said that the decision in that case meant that "whenever money is under the care and control of the Court the intention of the General Order was to give the enlarged power of investment."

Prohibition in trust.

Having regard to the absolute terms of sect. 11 of the Act of 1860, *Malins*, V.-C., went so far as to hold that trustees might adopt any of the investments mentioned in the order, notwithstanding any prohibitive or restrictive words in the settlement intended to prevent investment in any other than Government or Parliamentary Securities: *Re Wedderburn's Trusts*, 9 Ch. D. 112.

Lord Cranworth's Act.

By 23 & 24 Vict. c. 145, s. 25, trustees having trust money in their hands which it was their duty to invest at interest, were authorised at their discretion to invest the same in any of the Parliamentary Stocks or public funds, or in Government Securities, and also to call in any trust funds invested in any other securities, and invest them on any such securities as aforesaid, and also from time to time to vary any such investments as aforesaid for others of the like nature, subject to certain provisions and conditions in that section and sect. 32, which need not now be stated. The section has now been repealed by the Conveyancing and Law of Property Act, 1881, sect. 71.

Investment on charges

Again, by sect. 60 of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114):—

667, where Lord *Selborne*, sitting for *Romilly*, M.R., and intending to follow a former decision of that judge (*Re Shaw's Settled Estates*, L. R. 14 Eq. 9), held that money paid into Court under the Settled Estates Act was not within the order.

"Trustees who may be directed or authorised to invest any money on *real security* shall (unless the contrary be provided by the instrument directing or authorising such investment) have power at their discretion to invest money in such charges" (*g*) [*i.e.* created under the authority of the Act], "or on mortgages thereof."

Investment of Trust Funds.

under Land Improvement Act, 1864.

The Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), by sect. 40, enacts that:—

Mortgage Debenture Act.

"In all cases in which by the instrument creating the trust, trustees have a general power to invest trust-monies in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, they may invest such trust monies on the security of mortgage debentures duly issued under and in accordance with the provisions of this Act" (*h*).

Again, by the Act to amend the law as to the investment on real securities of trust funds held for public or charitable purposes (33 & 34 Vict. c. 34), s. 1, Corporations and Trustees holding monies in trust for any public charitable purpose may invest the same on any real security authorised by or consistent with their trusts, notwithstanding the laws relating to mortmain; and no contract for or conveyance of any interest in land made *bonâ fide* for the purpose only of such security is to be void by reason of noncompliance with the conditions and solemnities required by the Mortmain Act (9 Geo. 2, c. 36), and by sect. 3 the words "real security" include "all mortgages or charges legal or equitable of or upon lands or hereditaments of any tenure,

Investment on real securities of public or charitable trust funds (33 & 34 Vict. c. 34).

(*g*) By the preceding part of the same section these charges are, as regards the holder, to be deemed to be personal property; but the holder may by deed direct his charge to be reunited to and merge in the beneficial interest in the land charged, as if it were of the same nature and tenure therewith.

(*h*) This Act (sect. 2) applies to all such companies incorporated and carrying on business under the Companies Act, 1862, or any Act, as then were or thereafter might be entitled to advance money on the security of land.

The Act has been amended by the Mortgage Debenture Amendment Act, 1870 (33 & 34 Vict. c. 20), which by sect. 4, repealing sect. 5 of the Act of 1865, defines the nature of the securities upon which debentures may be founded.

Investment of Trust Funds.

or of or upon any estate or interest therein, or any charge or incumbrance thereon."

Debenture Stock Act, 1871.

The Debenture Stock Act, 1871 (34 Vict. c. 27), by sect. 1 enacts that :—

"Where a power has before the passing of this Act (29th June, 1871) been or shall at any time hereafter be given to trustees (*i*) to invest trust funds in the mortgages or bonds of a railway company or of any other description of company, such power shall, unless the contrary is expressed in the instrument creating the power, be deemed to include a power to invest such funds in the debenture stock (*k*) of a railway company or such other company as aforesaid, and an investment of trust funds in debenture stock may be made accordingly."

Statutory securities of public authorities.

Again, investments are now authorised by various statutes which are passed from time to time, upon the securities issued under the provisions of those statutes by public bodies, Local Authorities, and Local Boards.

Metropolitan Board of Works (Loans) Act, 1871.

Thus, by the Metropolitan Board of Works (Loans) Act, 1871 (34 & 35 Vict. c. 47), sect. 13, a trustee, executor, or other person empowered to invest money in the public stocks or funds or other government securities may, unless forbidden by the will or other instrument under which he acts, whether prior in date to this Act or not, invest the same in Consolidated Stock (*i. e.*, issued by the Metropolitan Board of Works).

Local Loans Act, 1875.

And again, by the Local Loans Act, 1875 (38 & 39 Vict c. 83), s. 27 :—

"Any trustees or other persons for the time being authorised or directed to invest any monies in the debentures or debenture

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(*i*) "Trustees" includes executors, administrators, and any other persons holding funds in a fiduciary capacity (sect. 2).

(*k*) Debentures or debenture bonds represent a temporary loan to the issuing company, and the company is liable to repay the capital. Debenture stock represents a loan *in perpetuum*, and the holder has no means of realising his capital except through the agency of a transfer; the stock is a charge on the net profits and earnings of a trading corporation, but not on the lands of the company, and the rights of the holder are limited by the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 22, 23, 24, authorising the creation of such stock; and see per *James*, L.J., in *Attree* v. *Hawe*, 9 Ch. D. 349, 351.

stock of any railway or other compay shall, unless the contrary is provided by the instrument authorising or directing such investment, have the same power of investing such monies in any nominal debentures (*l*) or nominal debenture stock (*m*) issued under this Act as they have of investing such monies in debentures or debenture stock of any railway or other company as aforesaid."

Investment of Trust Funds.

Nominal debentures . . debenture stock.

But by sect. 21 :—

"A trustee of debenture stock" [created and issued by a local authority empowered to raise a loan by issue of such stock, sect. 6] "shall not apply for or hold a stock certificate to bearer unless authorised to do so by the terms of his trust and any contravention of this provision by a trustee shall be deemed a breach of trust."

Stock certificate to bearer.

By the Isle of Man Loans Act, 1880 (43 & 44 Vict. c. 8), sect. 7, it is enacted that :—

Isle of Man Loans Act.

"Any trustees or other persons in the Isle of Man for the time being authorised or directed to invest any monies in securities in the Isle of Man, and any trustees or other persons for the time being authorised or directed to invest any monies in the securities of the government of a colony shall, unless the contrary is provided by the instrument authorising or directing such investment, have the same power of investing the said monies in any securities of the government of the Isle of Man under this Act."

By the National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), sect. 6, the National Debt Commissioners are directed from time to time to make advances of money authorised by Parliament for local loans. By sect. 8, the Treasury is empowered to create capital stock, consisting of perpetual 3 per cent. annuities, called Local Loans Stock, such annuities being charged on the Consolidated Fund; and by sub-sect. 6 of that section all persons having power, whether subject or not to any restrictions or conditions, to invest in any other stock of 3 per cent. perpetual annuities, shall have power subject to the same restrictions and conditions (if any) to invest in Local Loans Stock.

(*l*) By sect. 5 a "nominal debenture" means a debenture in which the principal sum is made payable to a person *named* therein, his executors, administrators or assigns.

(*m*) By s. 6 "nominal debenture stock" means debenture stock in respect of which a stock certificate to bearer has not been issued.

Investment of Trust Funds.

The provisions of the Settled Land Act, 1882, with regard to the investment of capital monies arising under that Act will be considered later, in treating of real settlements.

As to inserting express investment clauses.

Express Trusts for Investment.]—Such are the chief statutory enactments authorising trustees to invest funds under their control, and it will be observed that even in the absence of any express power or trust for investment in the instrument under which they hold the property, a large choice of investments is open to them. And accordingly, where such a range is wide enough to satisfy the wishes of the parties, the settlement may either contain no provisions as to investment, or it may merely contain a direction to invest in or upon any stocks, funds, or securities authorised by any act of parliament, or by the rules of the Court. Inasmuch, however, as either of these courses would probably render necessary a reference, on the occasion of a proposed investment, to the numerous statutory enactments with regard to investments which have been referred to in the foregoing pages, it would seem more convenient, in such a case, specifically to enumerate the particular stocks, funds, and securities, in or upon which trustees may invest the trust funds, such enumeration being made to include the several investments sanctioned by law. It may be well expressly to extend the power to investments which may be authorised by any statute or rules which may hereafter be for the time being in force.

Disadvantages of unduly wide investment clauses.

If the parties so desire, it is competent for them to insert in the settlement provisions authorising a more extensive range of investments, and forms of such provisions will be found in the following Precedents. But this course should not be adopted without due consideration, and trustees will do well to hesitate before they undertake the heavy responsibility thrown upon them by wide investment clauses. Clauses authorising a great variety of investments, some perhaps of an unduly speculative character, often subject trustees to the importunities of tenants for life, who naturally desire an increase

Investment of Trust Funds.

of income. Though the suggested investment may be expressly authorised by the terms of the settlement, the trustee, before he adopts it, must satisfy himself that the investment is safe and adequate, and the investigation may cause him much anxiety and trouble. If after such investigation, he finds that he cannot prudently accede to the proposal, he runs the risk of incurring the dislike, and even the animosity of his *cestui que trust.* If, on the other hand, he makes the proposed investment, and a loss thereby is caused to the trust, he may be held accountable, and be required to make good the loss, if the Court should be of opinion that the loss might have been avoided by a fuller investigation or a sounder exercise of judgment on his part (*n*).

Meaning of terms used in investment clauses.

It will be convenient in this place to consider what investments are authorised by the several expressions commonly used by conveyancers in investment clauses.

Power to invest on "real securities."

A power to invest in "real securities" does not, as a general rule, justify a trustee in lending trust funds on a mortgage of leasehold property.

Mortgages of long terms of years are not real securities.

Trustees who were authorised by statute, or by the terms of the trust, to invest on "real securities" were not, prior to the Trustee Act, 1888 (51 & 52 Vict. c. 59), justified in investing upon a mortgage of a long term of years, such securities, as a general rule, not answering to the description of real securities: *Re Boyd's Settled Estates*, 14 Ch. D. 626; *Leigh* v. *Leigh*, W. N. 1886, p. 191; see *Re Chennell, Jones* v. *Chennell*, 8 Ch. D. 492.

Now, however, by sect. 9 of the Trustee Act, 1888, it is enacted that:—

Investments on mortgage of long terms.

"A power to invest trust money in real securities shall authorise and shall be deemed to have always authorised an investment upon mortgage of property held for an unexpired term of not less than two hundred years and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent."

The effect of this enactment is that the statutory

(*n*) As to the right of a trustee to indemnity from a *cestui qui trust* at whose instance a detrimental investment is made, see *post*, p. 346.

Investment of Trust Funds.

power given by Lord St. Leonards' Act (*ante*, p. 256) is extended so as to authorise investments on such leasehold securities as are here mentioned.

Leaseholds for lives perpetually renewable in Ireland.

A trust or power to invest on real security in Ireland was held to authorise an investment on leaseholds for lives perpetually renewable with a head rent, because that was the common tenure of land in that country: *Macleod* v. *Annesley*, 16 Beav. 600; but it was held at the same time that the trustees ought not to advance more than half the value of the property. But trustees, unless expressly authorised so to do, cannot, as a general rule, safely lend on the security of leaseholds for lives.

In general investment in short leaseholds improper.

And it may be laid down as a general rule that an investment on leaseholds held for short terms, and incumbered with onerous covenants and clauses of forfeiture, is in the absence of an express direction, improper: Hill on Trustees, p. 375; Lewin on Trusts, 327; referring to *Townend* v. *Townend*, 1 Giff. 201; *Fuller* v. *Knight*, 6 Beav. 209; *Re Chennell, Jones* v. *Chennell*, 8 Ch. D. 492.

Where land is from the nature of the property subject to fluctuations of trade.

Nor does a power or trust to invest on real securities authorise an investment on freehold land, which for any reason inherent to the nature of the property itself becomes the subject of and is liable to the fluctuations of a trade or business: *Stickney* v. *Sewell*, 1 My. & Cr. 8, 15.

Mortgage of freehold brickfield.

In the recent case of *Re Whiteley, Whiteley* v. *Learoyd*, 33 Ch. D. 347 (affirmed 12 App. Ca. 727), a question was raised whether an investment of trust-money on a mortgage of a freehold brickfield was a "real security" within a power to invest on real securities. The Court of Appeal held that although such an investment is technically a real security, and as such would be a security within the terms of the power, it could not be treated as a real security for any sum beyond the value of the land as land; and that if and so far as the value of the security depended upon the trade to be carried on upon the land, and upon the value of the buildings and machinery which were available only for that particular trade,

Investment of Trust Funds.

it would not be a real security. If the buildings and machinery, instead of being available only for the particular trade being carried on upon the land, are available for other purposes, their value may, it would seem, be taken into account in estimating the extent of the real security: *per Cotton*, L.J., ibid. p. 352. "But a security of so hazardous a nature, although in one sense and to some extent a real security, is not a proper security for trust-money": *per Lindley*, L.J., ibid. 356. Where, as in the case of a brickfield, the security is one which is constantly being exhausted by the working, *i.e.*, where the steps which are necessary for rendering that security valuable involve a diminution of its substance, it is obvious that a trustee is bound to exercise more than usual caution when lending on such a security: *per Cotton*, L.J., p. 352.

So in *Stretton* v. *Ashmall*, 3 Drew. 9, a power to lay out "upon such securities as they should approve," was held not to authorise an investment in trade buildings, the trustees not having ascertained that they were worth at least twice the amount of the money invested: see *Royds* v. *Royds*, 14 Beav. 54.

Unlet houses.

Trustees should not lend on the security of unlet houses, especially if the mortgagor is a builder: *Hoey* v. *Green*, W. N. 1884, p. 236; see *Smethurst* v. *Hastings*, 30 Ch. D. 490.

Life interest of husband.

Second mortgage.

A trust or power to invest on real securities does not authorise an investment on a second mortgage: *Norris* v. *Wright*, 14 Beav. 308; *Drosier* v. *Brereton*, 15 Beav. 226; and see *ante*, Vol. III. p. 847; for in that case the trustees will not obtain the legal estate (*o*), but will be exposed to the risk of foreclosure and sale by the first mortgagee, and of

(*o*) For the purposes of this rule a charge under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114, s. 61) is not, in the absence of express prohibition, to be deemed an incumbrance. And see the Copyhold Acts, 21 & 22 Vict. c. 94, s. 33, and 50 & 51 Vict. c. 73, s. 23, where notwithstanding the priority given by those statutes to charges for compensation for enfranchisement, already existing charges are authorised to be continued.

Investment of Trust Funds.

being ousted of their security by tacking (*p*). Nor should they lend on the security of a deposit of title-deeds.

Trustees without authority should not bind themselves not to call in mortgage for a certain time.

And in the case of a sale by trustees where, as is often advisable, part of the purchase-money is allowed to remain on mortgage, the trustees should be careful to take a legal mortgage for the amount remaining unpaid; but they must not, unless expressly authorised so to do, bind themselves not to call in the mortgage before a certain time: *Vickery* v. *Evans*, 33 Beav. 376; *S. C.* 3 N. R. 286.

Submortgage.

But it would seem that trustees may invest on a submortgage provided they obtain the legal estate and are put into a position to exercise the powers arising under the original mortgage deed: *Smethurst* v. *Hastings*, 30 Ch. D. 490.

Contributory mortgage.

Trustees are not justified, unless expressly authorised by the settlement, in lending on a contributory mortgage: they are bound to see that they will have the control of the property in their own hands so as to be able to act solely for the benefit of their own *cestuis que trust:* they therefore should not take a mortgage in the joint names of themselves and a stranger; nor should they take a joint mortgage in the name of a common trustee on behalf of strangers as well as themselves which would amount to a delegation of their duty: Lewin on Trusts, 331; see *Webb* v. *Jonas*, 39 Ch. D. 660.

Mortgage of life estate.

Of course, a power to invest on real securities does not justify a loan of trust-money on the security of a life estate in realty, coupled with a policy of assurance on the life of the borrower; for the policy, which is the main security for the repayment of the principal advanced, is a merely personal security, depending not only on the regular payment of the premiums, but also on the solvency of the society by which it is issued.

Mortgage of share or reversion.

There seems to be no rule against lending on the security of an undivided share or of a reversionary

(*p*) The risk of being ousted by consolidation is removed as regards mortgages made since 1881 by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 17.

Investment of Trust Funds.

interest; but in the latter case care should be taken to ascertain the *present* value of the reversion, and not to lend more than the proper proportion of such value: see Lewin on Trusts, 328.

Ground rents.

A power to invest on the security of freehold hereditaments will authorise a loan on a mortgage of freehold ground-rents: *Vickery* v. *Evans*, 33 Beav. 376; *S. C.*, 3 N. R. 286; see also *Re Peyton's Settlement Trusts*, L. R. 7 Eq. 463.

Copyholds, Mortgage of.

Copyholds are a real security, and an investment upon a mortgage of copyholds is consequently within such a trust or power as aforesaid.

Actual surrender.

The trustees should, however, procure an actual surrender: *Wyatt* v. *Sharratt*, 3 Beav. 498.

Turnpike bonds.

It was held in *Robinson* v. *Robinson*, 1 De G. M. & G. 247, that turnpike bonds, which under the Act creating them included not only the tolls but also the toll-houses, were real securities. There are numerous cases to be found in the books with reference to the nature of turnpike bonds, debenture bonds issued under special Acts of canal companies, harbour boards, and the like.

Cases with reference to Mortmain Act.

The question has generally arisen, with reference to the provisions of the Mortmain or the Charitable Trusts Act of 9 Geo. 2, c. 6 (*q*), prohibiting devises for charitable purposes of "lands, tenements, or other hereditaments corporeal or incorporeal whatsoever," and the point discussed has been whether or not the particular securities were of the nature of realty. The result appears to be that in each case the terms of the special Act authorising the issue of the securities, and the wording of the particular instrument, must be looked at, to see whether anything in the nature of land or connected with land is included in the bond, or only the tolls, rents, or profits, a merely personal franchise or right, as distinguished from and independent of the land: see, for a review of the principal cases, *Re Christmas*, *Martin* v. *Lacon*, 33 Ch. D. 332, reversing the decision of *Chitty*, J., 30 Ch. D. 544.

(*q*) See now the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

Investment of Trust Funds.

Turnpike bonds not suitable investment.

Lord *Cranworth*, in *Robinson* v. *Robinson*, 1 De G. M. & G., at p. 263, pointed out that, owing to the social changes resulting from the introduction of railways, an investment on turnpike bonds would not be a suitable one for trustees.

Railway debentures and debenture stock not real security.

Railway debentures and debenture stock are neither of them "real securities," inasmuch as the holder has no right to the soil of the lands required by or required for the railway: *Gardner* v. *London, Chatham and Dover Rail. Co.*, L. R. 2 Ch. 201; *Attree* v. *Hawe*, 9 Ch. D. 337.

Preferential shares or stock not a security.

An investment on preference shares or preference stock of a railway or other company is not authorised by a trust to invest on the debentures or other securities of a railway or other company: *Harris* v. *Harris*, 29 Beav. 107. In that case *Romilly*, M.R., held such an investment not to be an investment on the security of the funds of the railway as debentures, "but as an embarking the trust funds in the speculation of the company." But a trust to invest upon the "stock, shares, or securities of any incorporated company paying a dividend," was held by the same judge to authorise the investment on preference stock paying a fixed preferential dividend half-yearly in perpetuity: *Consterdine* v. *Consterdine*, 31 Beav. 330.

Company in the United Kingdom.

A company "in the United Kingdom" means, it is conceived, a company having its registered office or chief place of business in the United Kingdom, and perhaps a foreign company carrying on business in the United Kingdom with, so to speak, a residence of their own, a branch office in the United Kingdom: see *per Pearson*, J., in *Re Lloyd Generale Italiano*, 29 Ch. D. 219, 220, as opposed to foreign companies carrying on business in the United Kingdom by *agents*, ibid., and has no reference to the field of their operations.

Discretion to be exercised in investing on real security.

Duties and Liabilities of Trustees as to Investments.] —Trustees, when investing on real security, must, as in every other investment, exercise a proper discretion in the choice of the particular security. They must be careful to obtain a full valuation of the property, which should be made by some independent

Investment of Trust Funds.

valuer acting on their behalf; and it is advisable that the valuer should be acquainted with the property and the neighbourhood, though it is not now essential that he should be carrying on business in that locality: see *post*, p. 275. They cannot safely rest content with a valuation made by or on behalf of the proposed mortgagor: *Ingle* v. *Partridge*, 34 Beav. 411; *Fry* v. *Tapson*, 28 Ch. D. 268. And the trustees should themselves choose their own valuer, for it is no part of the duty of a solicitor, as such, to choose valuers; and if trustees leave it to their solicitor to make the choice, and the valuer selected by him should be held by the Court to be one whose valuation a prudent person should not have accepted, the trustees will be responsible for any injury suffered by the trust estate: Ibid.; see *Budge* v. *Gummow*, L. R. 7 Ch. 719.

Trustees should choose their own valuer.

The tendency of the Court at the present time is to treat trustees with greater leniency, and not to punish them severely for every mistake made by them in their unthankful and gratuitous office (per *Jessel*, M.R., in *Speight* v. *Gaunt*, 22 Ch. D., at p. 746); but it is a clear and inflexible rule that trustees are bound, in administering their trusts, to deal with the trust property and conduct the business of the trust in the same manner in which a prudent man of business would deal with his own property and conduct his own business: *Smethurst* v. *Hastings*, 30 Ch. D. 490, 498; *Speight* v. *Gaunt*, 22 Ch. D., at p. 739; *S. C.* 9 App. Ca. 1. But they must have regard not only to the interests of those entitled to the income, but also to the interests of those who will take in future: per *Cotton*, L.J., in *Re Whiteley*, *Whiteley* v. *Learoyd*, 33 Ch. D., at p. 350.

Principles on which trustees should act.

A trustee is not bound to have special knowledge; and where such knowledge is required, he may and ought to consult those who can advise him from their special knowledge, *e.g.*, lawyers in the case of legal matters; experts as to the value of property (per *Cotton*, L.J., ibid., at p. 350); and so he may employ stockbrokers and other agents, in cases where a prudent man of business would, according to the ordinary course of business if acting on his

Special knowledge.

When trustee may rightly employ agents.

Investment of Trust Funds.

own behalf, reasonably employ any such agents. And a trustee will not be liable for the default of an agent so employed: *Speight* v. *Gaunt*, *supra*; see *Ex parte Belchier*, Ambl. 218. And trustees will not be guilty of negligence in signing transfers to persons represented by the broker to be his purchasers: *Magnus* v. *Queensland National Bank*, 36 Ch. D. 25, 35. Trustees employing a broker to reinvest may give him the command of the proceeds of sale for that purpose. But they must show vigilence in seeing that the reinvestment is properly made: ibid. It is not enough for a trustee to show that he has acted *bonâ fide* upon the advice of competent persons possessed of the special knowledge required on any particular occasion; he must also show that, in acting on that advice, he has acted as a prudent owner would have acted on behalf of all the persons interested under the trust: see *per Lindley*, L.J., *Whiteley* v. *Learoyd*, 33 Ch. D., at p. 356. See also *Maberley* v. *Maberley*, 33 Ch. D. 455.

Trustee must act as prudent man on behalf of all *cestuis que trust*.

Trustee may not delegate execution of his trust.

But neither the statutory protection conferred upon trustees by the 22 & 23 Vict. c. 35, s. 31, exonerating them from liability "for any banker, broker, or other person with whom any trust monies or securities may be deposited," nor the doctrine laid down by the last-named cases, will authorise a trustee to delegate the execution of the trust, and the care and custody of the trust monies, to strangers in cases where (to use the words of Lord *Hardwicke* in *Ex parte Belchier, supra*) "there is no moral necessity from the usage of mankind" for the employment of such an agency: see *per* Lord *Selborne*, L.C., in *Speight* v. *Gaunt*, 9 App. Ca., at p. 5; see also *Rowland* v. *Witherden*, 3 Mac. & G. at p. 574; *Floyer* v. *Bostock*, 35 Beav. 603, 606. Therefore if trustees on selling trust property or changing an investment leave any part of the trust fund longer than is necessary for the purposes of a payment or transfer, with their solicitors, or bankers, and it is lost in consequence, then, notwithstanding the generality of the practice, the trustees will be liable: *Fry* v. *Tapson*, *supra*. The effect of the statute is to throw the *onus probandi* on those who

Investment of Trust Funds.

seek to charge an executor or trustee with a loss arising from the default of an agent, where the propriety of employing an agent has been established: *per* Lord *Selborne*, C., in *Re Brier*, *Brier* v. *Evison*, 26 Ch. D. at p. 243. This liability of trustees is expressly maintained by sect. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), *post*, p. 336.

Proportion of advance to value of property.

According to what has long been "the general understanding of the profession and the practice of the Court," a trustee has hitherto been held not to be justified in advancing money on agricultural freeholds to the extent of more than two-thirds of the value of the property, or of more than one-half of the value on house property: *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Fry* v. *Tapson*, 28 Ch. D. 279. But there has been no inflexible principle that this rule as to value must in all cases be adhered to: *Re Godfrey*, *Godfrey* v. *Faulkner*, 23 Ch. D. 483; and in applying the rule, all the circumstances of each case might be looked at: *Olive* v. *Westerman*, 34 Ch. D. at p. 73. Where trustees acting upon the advice of competent persons and in the *bonâ fide* exercise of a discretion as prudent men of business had advanced trust money on the security of property (even though the above rule as to value was not strictly adhered to), they have been held not to be held liable for any subsequent depreciation in value: *Whiteley* v. *Learoyd*, 33 Ch. D. 347; and compare *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Olive* v. *Westerman*, 34 Ch. D. 70.

Where house property let to weekly tenants.

Trustees proposing to invest on the security of house property let out to weekly tenants should bear in mind that the landlord has to pay rates and taxes, the amount of which as well as any chief rent which may be payable will have to be taken into account in estimating the value of the property.

Duty of trustees in obtaining valuation of house property.

Trustees when lending trust money on house property should inform their valuers that they are lending *trust money*, and that they do not desire to advance more than one-half (now two-thirds) the actual value of the property, and should ask for a valuation which would enable them to judge whether they are justified in lending the amount which they propose to lend: *per Kay*, J., *Olive* v. *Westerman*, at p. 73.

Investment of Trust Funds.

Valuation of freehold on purchase of ground rents.

In the case of *Vickery* v. *Evans* (33 Beav. 376; 3 N. R. 286), it was held that an investment of 3530*l.* upon freehold ground-rents of 176*l.* a year was a proper investment, for that though the value of the freehold was only about 4344*l.*, still the real annual value of the house property on which the rents were secured, and on which the landlord could enter if the ground-rents were not paid, was 1000*l.*

Title.

Again, trustees must be careful in investigating the title to the property on which they propose to advance their money, and will be responsible if, through a defect of title, their security either entirely fails, or becomes insufficient to repay the advance. But it would seem to be consistent with the doctrine laid down in *Speight* v. *Gaunt*, that if a trustee employed a solicitor to investigate the title, inasmuch as an employment of a solicitor for such a purpose would be in the ordinary course of business, he would not be liable if, acting on the solicitor's advice, he *bonâ fide* accepted a defective title: see observations of *Lindley*, L. J., in that case, 22 Ch. D., p. 761, referring to *Hopgood* v. *Parkin*, L. R. 11 Eq. 74; and see *per Cotton*, L. J., in *Whiteley* v. *Learoyd*, 33 Ch. D., at p. 350.

Stat. 51 & 52 Vict. c. 59.

An indemnity of great practical value has been given to trustees acting *bonâ fide* with regard to investment of funds under their control by the Trustee Act, 1888 (passed on 24th Dec., 1888), which adopts and extends the principles of decision of Courts of Equity, at all events in more recent times.

The Act applies (s. 12) to trusts created by instrument executed before as well as to trusts created after the passing of the Act, with a proviso that (save as in the Act expressly provided) nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

By sect. 4 of this Act it is enacted as follows:—

Loans by trustees.

"(1.) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only

Investment of Trust Funds.

of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend.

"(2.) No trustee lending money upon the security of any leasehold property shall be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title.

"(3.) No trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property, or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

"(4.) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act."

Rules laid down in *Fry* v. *Tapson*.

In the case of *Fry* v. *Tapson*, 28 Ch. D. 268, *Kay*, J., laid down certain definite rules with regard to the duties of trustees as to ascertaining the value of proposed securities, and the amounts which might properly be advanced. These rules were in effect as follows:—(1) the valuer employed by the trustees must be a surveyor having local knowledge of the district where the property forming the proposed security is situate; (2) the valuer must be selected by the trustees themselves as being a person who, to the best of *their own* personal belief, is an able

Investment of Trust Funds.

practical surveyor; (3) the valuer must not be a person recommended or employed by the intending mortgagor; and (4) not more than one-half of the estimated value should be lent by trustees upon house property. Rules (1) and (4) as thus laid down are abrogated, or at all events considerably modified by the recent Act, while rules (2) and (3) apparently remain in full force.

Requirements of the Trustee Act, 1888.

The requirements of the enactment, so as to entitle trustees to the protection thereby offered, seem to be as follows :—

Report of able practical surveyor.

First, trustees intending to lend money on mortgage must cause a report as to the value of the property to be made by a person whom they reasonably believe to be an able practical surveyor or valuer. It is expressly rendered immaterial whether the person employed as valuer carries on business in the locality where the property is situate, but it will still be generally advisable in the interests of the *cestui que trust*, and in some cases probably necessary for the protection of the trustees, that he should have some knowledge of that locality. See as to this, *Fry* v. *Tapson*, *supra;* and *Budge* v. *Gummow*, L. R. 7 Ch. 719.

Trustees must themselves choose surveyor.

Secondly, the person appointed by the trustees to value the property must be one whom they *personally* have reason to believe to be an able practical surveyor or valuer. It is not an uncommon practice for trustees to leave the choice of a valuer to their solicitor, but it is no part of a solicitor's business to recommend a valuer, and if trustees delegate to an agent duties which are not within that agent's proper functions, they do so at their own risk.

Surveyor must be employed and paid by trustees themselves.

Thirdly, trustees cannot safely under any circumstances lend on a valuation made for the mortgagor, or employ a valuer who is in the employment of, or recommended by, the intending mortgagor. In *Ingle* v. *Partridge*, 34 Beav., at p. 414, Lord *Romilly*, M.R., said, "A trustee cannot, with propriety, lend trust money upon mortgage upon a valuation made by or on behalf of the mortgagor. If he does, and the valuer has *bonâ fide* valued the property at

Investment of Trust Funds.

double its value, the trustee must take the consequences; he ought to have employed a valuer on his own behalf to see to it." The valuer should be paid directly by the trustees, so as to render him directly responsible to them for the propriety of his valuation; otherwise, in case of an excessive valuation, it will be necessary for the trustees, in order to make him responsible to them, to show that he was aware that he was employed to value on their behalf, and for what purpose the valuation was made: see *Cann* v. *Wilson*, 39 Ch. D. 39. The valuer's fee should be paid in the first instance by the trustees, and repaid to them by the mortgagor. It is not unusual for the valuer to receive a higher fee if the mortgage is carried into effect; but such an arrangement has been judicially pronounced to be improper: *per Stirling*, J., in *Smith* v. *Stoneham*, W. N. 1886, p. 178.

Not more than two-thirds of value to be advanced.

Fourthly, the report must state the estimated value of the property forming the proposed security, and should expressly advise as to the amount which may be safely advanced upon the security, such amount not to exceed in any case two-thirds of the value of the property as stated in the report. The distinctions formerly made as to what was a proper advance according as the property was agricultural land, house property, or otherwise, is now done away with, and a uniform proportion of advance to value is prescribed, which must not be exceeded in any case.

Extent of the statutory indemnity as to proportion of advance to value of property.

Trustees lending trust-money will thus be to a great extent relieved from responsibility, provided that they act in accordance with the valuation, and under the advice of a surveyor or valuer who is duly qualified and properly appointed. It is however to be observed that sub-sect. (1) does not absolutely free from liability trustees lending money upon the security of any property provided they comply with the statutory requirements, but merely enacts that they shall not be "chargeable with breach of trust by reason *only* of the proportion borne by the amount of the loan to the value of such property at the time the loan was made." It would therefore seem that

Investment of Trust Funds.

the security must be in other respects one upon which trustees would have been justified in advancing money according to the principles of law hitherto recognised, and that trustees must, in order to entitle themselves to the benefit of the statutory indemnity, have regard now as heretofore to the question whether the particular property is in its nature authorised by the trust, and also to any incidents of tenure, such as onerous covenants, &c., or to any special considerations, such as that the property is of a speculative character, or dependent for its value on temporary or accidental circumstances.

Title to leaseholds.

Sub-sect. 2 of the enactment above stated removes the anomaly hitherto existing, that though trustees on a *purchase* of leaseholds were by sect. 3 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), relieved from responsibility for not requiring production of the lessor's title, yet they were bound to require production of such title on lending trust-money on a mortgage of leasehold property.

Defective title.

Sub-sect. 3 is apparently intended to afford some protection to trustees who lend on a security the title to which is defective in point of time. But the protection is so restricted and qualified as to be apparently of little practical value. It is very usual in settlements to insert an express provision to the effect that trustees shall not be answerable or accountable "for lending on any security with less than a marketable title." But the statutory protection only applies to the acceptance of "a *shorter* title than that which a purchaser is, in the absence of a special contract, entitled to require," *i.e.*, a title commencing not less than forty years back; and does not extend to any other defect of title. Moreover, this limited protection is qualified by the provision that the title must be such as, in the opinion of the Court, a person acting with prudence and caution would have accepted, thus apparently throwing on the trustee the onus of proving, to the satisfaction of the Court, that he acted with prudence and caution, which he is hardly likely to succeed in doing if it should turn out that the earlier title was defective, so as to oust or prejudice the security.

Investment of Trust Funds.

The only question which seems to arise on the construction of sub-sect. 4, which extends the statutory indemnities to past dealings with trust funds, is as to whether the expression "investments" includes purchases. Strictly the use of the previous words "transfers of securities" would seem to confine the expression so as to mean investments *ejusdem generis.*

Purchases made out of trust monies.

Trustees are not justified in lending trust-monies to their co-trustees; for the beneficiaries are entitled to have the judgment of all the trustees as to the expediency of every proposed security, unbiassed on the part of any of them by any interested motive.

Loan to co-trustee.

It has been seen (*ante*, p. 268), that trustees should not mix up the trust funds with other funds by way of contributory mortgage. If a trustee mixes up trust funds with his own monies so that the two cannot be accurately separated, he will be charged with the whole, except what he can prove to be his own: *Lupton* v. *White*, 15 Ves. 432; *Cook* v. *Addison*, L. R. 7 Eq. 466.

Mixing trust funds.

In investing trust monies on mortgage the trustees ought not to employ the solicitor who acts for the borrower, both because of the inconvenience which may arise from the doctrine of implied notice, and because there is, in such a case, a conflict of duties on the part of the solicitor, who cannot adequately represent the interests of both lender and borrower: Lewin on Trusts, 337, citing *Waring* v. *Waring*, 13 Ir. Ch. R. 331; see also *Taylor* v. *Blacklow*, 3 Bing. N. C. 235, for an instance of such conflict of duties, where the mortgagor's title proved defective.

Trustees lending on mortgage should not employ the borrower's solicitor.

Trustees, unless expressly authorised so to do, are not justified in lending trust funds on personal security: *Holmes* v. *Dring*, 2 Cox, 1; *Styles* v. *Guy*, 1 Mac. & G. 423. If, as is sometimes the case, the parties to the settlement desire that the fund or part of it should be lent to the husband on his personal security, *e.g.*, a bond, or promissory note, express authority to that effect must be inserted in the settlement. Where trustees were empowered, with the consent of husband and wife, to invest the funds on

Loan on personal security.

Investment of Trust Funds.

such security either real or personal as they with such consent should think proper, in a suit brought by the wife for execution of the trusts of the settlement the Court allowed a sum of 2500*l.* to remain in the husband's hands, requiring him to execute a bond for payment of the capital and interest at 5 per cent.: *Pickard* v. *Anderson*, L. R. 13 Eq. 608; and see *Forbes* v. *Ross*, 2 Br. C. C. 430.

An apparently absolute discretion not sufficient.

An apparently absolute discretion in the trustees will not justify an investment on such a security; and such a discretion can only be exercised subject to the control of the Court where the trust is subject to administration by the Court: *Bethell* v. *Abraham*, L. R. 17 Eq. 24.

Stock mortgage.

A sale of stock and a loan of the proceeds on mortgage with a covenant by the mortgagor to pay interest equal to the amount of the dividends on the stock sold, and to replace the exact amount of stock sold out, instead of repaying the cash advanced, which is called a "stock mortgage," is not justified by the usual form of power to vary securities: *per Giffard*, L. J., *Whitney* v. *Smith*, L. R. 4 Ch. 513, 521.

Trustees must hold an even hand between all parties interested.

Trustees in making an investment, as well as in the performance of their other duties, must hold an even hand between the tenant for life and the remainderman. They should not be induced, in order to secure a higher rate of interest for the tenant for life, to invest in a security which from its speculative character would be likely to prejudice the remainderman, even although it might literally fall within the range of investments authorised by the settlement: *Cockburn* v. *Peel*, 3 De G. F. & J. 170; nor, again, should they unduly favour the remainderman at the expense of the tenant for life. "They are bound to preserve the money for those entitled to the corpus in remainder, and they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present": *per Cotton*, L.J., in *Whiteley* v. *Learoyd*, 33 Ch. D., at p. 350.

If, however, in any case, owing to peculiar circumstances, an increase of the income of the tenant

Investment of Trust Funds.

for life at the risk of a possible loss to those in remainder, is considered by the trustees to be advisable, the trustees will be protected if, in the *bonâ fide* exercise of their discretion, they make such an investment: *Cockburn* v. *Peel*, 3 De G. F. & G., at p. 174.

Where trustees have invested trust-money on a security which, although not unauthorised by the power, is of a hazardous nature, and have been held liable for the loss of that trust-money, on the ground that they did not exercise sufficient caution in making the investment, and are ordered to pay interest, say 4 per cent., to the tenant for life, from the date of the last receipt of interest from the investment, the tenant for life is not liable to refund to the trustees the higher rate of interest received from the investment, or to recoup to them the difference between the higher rate and 4 per cent.

Advice of Court.

Trustees would act wisely if, before making such an investment, or taking any other step of an ambiguous character, they were to obtain the sanction of the Court under the cheap and expeditious proceeding by way of originating summons: see Rules of the Supreme Court, 1883, Ord. 55, Rule 3.

Apportionment.

A sale of stock for the purpose of making another investment should be made as soon as possible after the payment of a dividend, so that the tenant for life may not be deprived of the income which has accrued since such payment; for it has been held that, unless under very exceptional circumstances (*Lord Londesborough* v. *Somerville*, 19 Beav. 295; *Bulkeley* v. *Stevens*, 10 L. T. (N. S.) 225), a tenant for life cannot claim any allowance out of the proceeds as representing the apportioned part of the dividends: *Scholfield* v. *Redfern*, 2 Dr. & Sm. 173; *Freeman* v. *Whitbread*, L. R. 1 Eq. 266; *Re Ingram's Trust*, 11 W. R. 980.

Apportionment Act, 1870.

Nor, as it would seem, is this rule at all affected by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), which applies only to a case where the estate of one person who has a limited interest in a fund determines between two periods of payment, so as to prevent the new owner from claiming the whole

Investment of Trust Funds.

income since the last period of payment, and would not apply to a case where there is merely a change in the amount or time of payment of income: *per Bacon*, V.-C., in *Re Clarke, Barker* v. *Perowne*, 18 Ch. D. 160.

Employment of trust funds in trade.

But where, in breach of trust, a sum of money was allowed by the trustees to be employed in trade, and large profits accrued thereon, it was held that the tenant for life was entitled in respect of income to 4 per cent. on the original sum, and upon all accretions of profits retained and employed in the business, and that the rest of the profits must be regarded as capital subject to the trusts of the settlement, and must be made good out of the estate of the husband of the tenant for life who had received part of the profits to the extent to which he had received them: *Re Hill, Hill* v. *Hill*, 45 L. T. 126.

Apportionment of proceeds of mortgage security as between tenant for life and remaindermen.

And where a mortgage security, on being sold, realised less than the principal sum, and the interest was also in arrear, the sum realised was directed to be apportioned between the tenant for life of the settled money and the persons entitled in remainder, in the proportions which the principal of the mortgage (belonging to the remaindermen) and the arrears of interest (belonging to the tenant for life) bore to one another, without any computation of compound interest: *Re Moore, Moore* v. *Johnson*, 52 L. T. 510; 33 W. R. 447; W. N. 1885, p. 17.

Apportionment of proceeds of sale of reversionary fund, when sale postponed for benefit of testator's estate.

But where the sale of a reversion has been postponed for the benefit of a testator's estate, on the fund falling in the proper mode of apportionment as between tenant for life and remaindermen is to ascertain what sum put out at compound interest at 4 per cent. per annum on the day of the testator's death, with yearly rests and deducting income tax, would have produced, at the date of its receipt, the sum actually received, and the sum so ascertained is to be treated as capital, and the residue as income: *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643.

Discretion in trustees to continue existing investment.

Where trustees are empowered at their discretion to continue trust funds in their present state of investment, and in the exercise of that discretion they

Investment of Trust Funds.

retain securities which, although not wasting, are of a hazardous and speculative character, the tenant for life is entitled to receive the whole income arising from such securities: *Re Sheldon, Nixon* v. *Sheldon*, 39 Ch. D. 50.

Power to vary.

In addition to the original power of investment should be introduced a power to vary investments into or for others of a like nature with those authorised. The limited power which was conferred by s. 25 of Lord Cranworth's Act is now taken away by the repeal of that section (44 & 45 Vict. c. 41, s. 71), and it is doubtful what authority a trustee, in the absence of an express power, has to make such variation (*r*): *Re Warde*, 2 J. & H. 191; *Re Clergy Orphan Corporation*, L. R. 18 Eq. 280; *Waite* v. *Littlewood*, 41 L. J. Rep. (Ch.) 636; Lewin on Trusts, 7th ed. p. 417.

Improper investment.

The former practice of the Court, according to which trustees held guilty of a breach of trust by reason of making an improper investment on the ground of undervalue, were bound to restore the whole trust fund, with the right of taking to such improper investment themselves, has now been altered by the Trustee Act, 1888, which by sect. 5 (which is retrospective), enacts:—

Trustee Act, 1888, s. 5.

Liability for loss by reason of improper investments.

"5.—(1.) Where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

"(2.) This section shall apply to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act."

It is to be observed that the statutory indemnity here given extends only to cases where an *excessive amount* has been advanced, having regard to the

(*r*) But see S. L. Act, 1882, sect. 21, as to investment of capital money.

Investment of Trust Funds.

actual value of the property, and where no proper valuation as prescribed by sect. 4 has been made; for in order to entitle a trustee to protection the investment must have been a proper investment in all respects for a less sum. Formerly a trustee who had advanced a sum in excess of what he was justified in advancing was liable to make good the whole loss, although the depreciation of the security might have been caused by agricultural depression, or other causes over which the trustee had no control: see Lewin on Trusts, 907, and the cases there cited. A trustee is now liable only to make good the difference between the amount for which the security would have been sufficient at the time of the advance, and the amount actually advanced. Where a trustee has duly complied with the requirements of sect. 4, subsect. 1, he will not require the protection afforded by sect. 5.

4. Trusts for Payment of Income.

As to who should take the first life-interest.

Life Interest of Husband—Forfeiture on Alienation or Bankruptcy.]—Next follow the trusts for the payment of the income of the invested trust funds. These vary necessarily according to the desire of the settlors in each case. As a general rule, in marriage settlements of personalty, the first life interest in the property is taken by the husband or wife, according as he or she brings it into settlement. If both bring monies into settlement each will, as a general rule, take the first life interest in the fund settled by or on behalf of him or her. But this general rule is subject to many modifications. From causes peculiar to the man, *e.g.*, his extravagance, or improvidence, or the fact that he is engaged in trade or business, it is often desirable that he should not have in every event the income of the settled fund or of the fund brought into settlement by him for the whole of his life, but that his interest therein should determine on his alienation or attempted alienation, or on his bankruptcy.

Whether a settlor can

Property cannot be settled on a person for life so

Trusts of Income.

as to enable the donee to retain it after an attempt at alienation; but a gift for life, subject to a proviso rendering the life interest determinable on alienation, is valid: *Brandon* v. *Robinson*, 18 Ves. 429; *Rochford* v. *Hackman*, 9 Hare, at p. 481. See also *Re Machu*, 21 Ch. D. 838; *Rosher* v. *Rosher*, 26 Ch. D. 801. And a man may thus settle his own property so as to prevent him from alienating or charging his life interest therein: *Brooke* v. *Pearson*, 27 Beav. 181. In that case it was provided by a marriage settlement that the trustees should pay the rents of the husband's property to him for life until he should alienate or charge his life interest, and on his so doing, that a rentcharge should become payable to his wife; after the marriage the husband mortgaged the property, and afterwards he became bankrupt: it was held that the rentcharge arose on the mortgage, and was valid as against the assignees in the bankruptcy. See also *Knight* v. *Browne*, 9 Jur. (N. S.) 894; *Re Detmold, Detmold* v. *Detmold*, 40 Ch. D. 585.

restrain himself from alienating his life interest.

Whether a settlor can render his life interest determinable on bankruptcy.

It has long been settled that a man cannot settle his own property so as to take a life interest therein determinable or defeasible on his bankruptcy, and thus defeat the claims of his creditors: *Higginbotham* v. *Holme*, 19 Ves. 87; *Re Murphy*, 1 Sch. & Lef. 44; *Whitmore* v. *Mason*, 2 J. & H. 204; *Ex parte Boddam*, 2 De G. F. & J. 625; *Ex parte Stephens*, 3 Ch. D. 807. But where the property is settled by the wife, or some person other than the husband, a gift of a life interest to the husband until bankruptcy, with a gift over of the interest on that event, is valid: *Lockyer* v. *Savage*, 2 Stra. 947; *Re Meaghan*, 1 Sch. & Lef. 179. Moreover, a limitation over on the bankruptcy of the husband of his interest in the property brought into settlement by himself is valid to the extent of any property of his wife which he may have received on the marriage: *Higginson* v. *Kelly*, 1 Ball & Be. 252; *Lester* v. *Garland*, 5 Sim. 205 (*s*).

(*s*) In *Whitmore* v. *Mason*, 2 J. & H. 204, at p. 214, V.-C. *Wood* explains the principle of *Lester* v. *Garland*, and similar cases as

Trusts of Income.

Before Married Women's Property Act, legacy to wife could be so settled.

Prior to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a legacy to which a wife became entitled during coverture might be so settled as to give her husband a life interest in it determinable on his bankruptcy or alienation on the ground that as the wife could have claimed her equity to a settlement of the whole legacy, the Court treated her as having done so, and held that the legacy was in the position of the wife's separate property: *Montefiore* v. *Behrens*, L. R. 1 Eq. 171. And now such a settlement could of course be made, inasmuch as under the Act such a legacy would belong to the wife provided she was married after 31st December, 1882, or, if married before that date, her title accrued thereafter: as to which see *Reid* v. *Reid*, 31 Ch. D. 402.

Absolute discretion to trustees as to disposition of husband's income.

But a husband can settle his own property in such a way as, while not limiting originally any interest to himself determinable on bankruptcy, to give trustees in the first instance the absolute power of disposing of the income during his life in or towards the maintenance and support of himself and his present or any future wife and his children, or any of them, or otherwise for their or any of their use and benefit in such manner as the trustees may in their uncontrolled discretion think proper. And the fact that under such a trust the settlor might possibly derive some benefit himself (*t*) will not make the settlement fraudulent within the Act 13 Eliz. c. 5: *Holmes* v. *Penney*, 3 K. & J. 90, 100; *Att.-Gen.* v. *Heywood*, 19 Q. B. D. 326.

Proviso for cesser.

A proviso for cesser on bankruptcy or any other event is valid, whether there be a gift over of the

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being that where there is a covenant on the part of the husband to settle a definite sum of money (10,000*l.*) and the husband has received another definite sum (5,000*l.*) as the wife's fortune, the Court treats 5,000*l.* of the 10,000*l.* as if it were the wife's own money and sets it off accordingly. Where the Court can find a definite sum which can be appropriated as the wife's property, it regards it not as the consideration she gives for the rest, but as the identical property which she contributed as her fortune upon the marriage: *ibid.*

(*t*) The settlor has a "species of interest" which would pass to his trustee in bankruptcy; and see *Lord* v. *Bunn*, 2 Y. & C. (Ch.) 98.

Trusts of Income.

trust property on the happening of that event or not: *Dommett* v. *Bedford*, 6 T. R. 684; *Joel* v. *Mills*, 3 K. & J. 458, 468.

Limitation of an interest determinable on bankruptcy, although future in terms, held to apply to bankruptcy at date of settlement.

A trust in a settlement limiting an interest determinable on bankruptcy, although the words literally refer to a future bankruptcy (*e.g.*, "until he shall become bankrupt," "upon his becoming bankrupt," "in case he shall at any time hereafter become bankrupt,") will be held to apply to an actually existing bankruptcy at the date of the settlement, where the manifest intention is that the beneficiary shall have *personal enjoyment: Manning* v. *Chambers*, 1 De G. & Sm. 282; *Seymour* v. *Lucas*, 1 Dr. & Sm. 177; *Re Muggeridge's Trusts*, Johns. 625; *White* v. *Chitty*, L. R. 1 Eq. 372; *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722; *Trappes* v. *Meredith*, L. R. 7 Ch. 248.

Annulment of bankruptcy or discharge of bankrupt before first payment due.

But if the bankruptcy has been annulled, or the bankrupt discharged, before the first payment becomes due to the person who had become bankrupt, and where accordingly there was nothing to deprive him of personal enjoyment, then where the words of forfeiture are words of futurity, the forfeiture does not take place: *White* v. *Chitty*, L. R. 1 Eq. 372; *Ancona* v. *Waddell*, 10 Ch. D. 157; *Samuel* v. *Samuel*, 12 Ch. D. 152; see also *Robertson* v. *Richardson*, 30 Ch. D. 623. Where, however, a donee of a life interest terminable on bankruptcy was a bankrupt for several years after he became entitled in possession, but ultimately procured the annulment of the bankruptcy on the terms that the first income accrued before the annulment should be paid to his creditors, it was held that the life interest was forfeited: *Re Parnham's Trusts*, L. R. 13 Eq. 413.

Test of the rule.

The test seems to be whether between the time when the right to the income in question had accrued to the person who had become bankrupt, and the time when the adjudication of bankruptcy was annulled or superseded there had been not only no attempt on the part of the trustee in bankruptcy to receive the income, but there had been no income in fact which could have been received: *Robertson* v. *Richardson*, *supra*, at p. 627.

Interest once

Where under such a limitation the interest has

Trusts of Income.

forfeited notwithstanding gift over is void is defeated.

been forfeited, when the event has once happened on which the settlor intended the gift over to take effect, then, notwithstanding that the gift over is void (*Doe* v. *Eyre*, 3 C. B. 557; 5 C. B. 713; *Robinson* v. *Wood*, 27 L. J. Rep. (Ch.) 726), or that the persons to take under the gift over do not exist or cannot be ascertained (*Hurst* v. *Hurst*, 21 Ch. D. 278), the interest of the original taker is none the less defeated.

Form of limitation.

The general form of words adopted for the purpose of giving such a determinable interest as that now under discussion is to the following effect:—"To A. for life or until he shall assign, charge, or incumber the same, or shall do or suffer any act or thing whereby the dividends or income or any part thereof might or would if belonging or payable absolutely to him become payable to or vested in any other person or persons."

Charging order on trust fund causes forfeiture.

It has been held that a charging order obtained by a creditor of the husband against the trust fund, causes a forfeiture under the words "do or suffer or permit any act whereby," &c., or similar words: *Montefiore* v. *Behrens*, L. R. 1 Eq. 171; *Roffey* v. *Bent*, L. R. 3 Eq. 759. The word "suffer" or "permit" being put in contradistinction to the word "do," applies to something done *in invitum*: *Ex parte Eyston*, *Re Throckmorton*, 7 Ch. D. 145.

In a very recent case (*Nixon* v. *Verry*, 29 Ch. D. 196), *Chitty*, J., held that under a limitation in favour of A. for life, "or until he should be outlawed or declared bankrupt or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors, or should assign," &c., the presentation by a firm in which A. was a partner of a petition for liquidation under the Bankruptcy Act, 1869, which was followed by acceptance by the creditors of a composition, operated as a forfeiture of A.'s life interest; for that although composition involved no *cessio bonorum* (see *Montefiore* v. *Enthoven*, L. R. 5 Eq. 35), it had been accepted under the Act, and A. had obtained through the Act the benefit of relief from his debts.

Composition by firm in which tenant for life partner.

Trusts of Income.

Filing of petition under Bankruptcy Act, 1883, if not followed by adjudication.

Where, under the Bankruptcy Act, 1883, a person had filed a bankruptcy petition, and on the same day a receiving order was made, but by a resolution duly confirmed and approved by the Court the creditors agreed to accept a composition, and a composition deed was executed, *Cave*, J., held that neither the filing of the petition (not being followed by an adjudication) nor the execution of the deed worked a forfeiture of the debtor's life interest under a limitation "until he should do or suffer something whereby the income if payable absolutely to him would become vested in any other person:" *Ex parte Dawes, Re Moon*, 17 Q. B. D. 275. His Lordship read the word "would" as meaning "will," and held that the clause required something that would *necessarily* vest the property in some other person, which the mere filing of a petition, if not followed by an adjudication, would not do; and his Lordship seemed to prefer the use of the word "might" to "would": *ibid.*, at p. 282.

When forfeiture on alienation only.

Where the forfeiture of the life interest was to arise on alienation only, the general rule was that only a voluntary alienation (which would include taking the benefit of an Insolvent Act) was intended, and that a proceeding *in invitum*, such as the filing by a creditor of a bankruptcy petition, did not operate as a forfeiture: *Lear* v. *Leggett*, 2 Sim. 479, affirmed, 1 Russ. & M. 690; *Pym* v. *Lockyer*, 12 Sim. 394.

Real estate in England, insolvency in New South Wales.

Under a clause in a settlement limiting real estate in England to A. "until he shall commit, &c., or any other event shall occur whereby the rents and profits would if hereby settled absolutely upon or in trust for him be forfeited to or become vested in any other person," *Kay*, J., held, that by the insolvency of A. in New South Wales the real estate, although not vesting in the official corresponding to the trustee in bankruptcy, had become "forfeited" to that official. His Lordship read "forfeited" as including, not merely that which is actually taken away by reason of some breach of condition, but also that which becomes liable to be so taken: *Re Levy's Trusts*, 30 Ch. D. 119.

Trusts of Income. — "Insolvent."

The word "insolvent" in a trust for the benefit of a person "until he becomes insolvent," is used in its ordinary business sense of "unable to pay his debts:" *Billson* v. *Crofts*, L. R. 15 Eq. 314; see *De Tastet* v. *Le Tavernier*, 1 Keen, 161.

Suggestion as to giving first life interest where the parties are in trade.

Where the husband is engaged in trade, or some other reasons exist making it specially desirable to protect the property from his creditors, it may be advisable that the first life interest in the property brought into settlement by him should be settled upon the wife, the second life interest being limited to the husband only if he survives. Where both husband and wife bring money into settlement, the first life interest in the husband's fund may be given to the wife, and the first life interest in the wife's fund may be given to the husband, being made determinable on his bankruptcy in one of the ways before mentioned.

Married Women's Property Act.

It is conceived that by virtue of the Married Women's Property Act, 1882, s. 19, the same principles that are applicable to a settlement by the intended husband of his property until bankruptcy will apply to the case of a settlement by the intended wife of her own property; and that consequently where it is desired for any reason to protect the wife's property against her creditors, similar modes of settlement to those hitherto adopted in the case of the man's property should be adopted in the settlement of her property.

Determinable annuity or life interest of wife.

Since the Act no question can arise as formerly whether an annuity or life interest limited to a female until she does something "whereby the annuity or life interest would be vested or likely to be vested" in any other person, or "whereby she would be deprived of her right to receive the rents," or similar phrases, ceases by her marriage without a settlement. For cases before the Act, see *Bonfield* v. *Hassall*, 32 Beav. 217; *Craven* v. *Brady*, L. R. 4 Ch. 296.

Life interest of wife.

Life Interest of Wife—Restraint on Anticipation.] —The life interest of the intended wife has hitherto, according to the usual practice, been limited to her

Trusts of Income.

separate use, and generally with a restraint upon anticipation.

Separate use.

As by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), all the property of a married woman belongs to her as her separate property, it is conceived that an express limitation to her separate use will not in future be necessary. But it would seem to be more correct where it is intended to restrain her from anticipating her income, to introduce such a limitation, and thus to engraft an equitable restraint upon an express equitable separate interest.

Before the Act. Whether separate use intended.

The question that frequently arose whether, on the wording of a particular clause, property was or was not intended to be given to the separate use of a married woman, *e.g.*, by the use of the words "own use," "absolute use," "sole," "sole use and disposal," &c., will not hereafter arise (except in the case of persons married before the Act and whose title to the property accrued before the Act), and it is not considered necessary to refer more fully to it here. Reference can be made to Vaizey on Settlements, Vol. I., pp. 753 *et seq.*; Lewin on Trusts, pp. 755 *et seq.*; Theobald on Wills, 2nd ed., 466—469; *Bland* v. *Dawes*, 17 Ch. D. 794.

But there is nothing in the Act which in any way dispenses with the necessity for inserting in proper cases a restraint upon anticipation (*u*).

Restraint upon anticipation.

The restraint upon anticipation was an invention of Equity, the object being to protect the wife

(*u*) There may be exceptional cases where owing to particular causes, *e.g.* the mature age of the lady, the insertion of the restraint may be considered inexpedient or unnecessary, but as a general rule the introduction of the restraint seems to be advisable, and it is invariably inserted by the Court in settlements made on marriages of its wards. A conveyancer, however, should obtain the express direction of the settlor before inserting a restraint on anticipation in a settlement. And where a woman brings her own property into settlement the effect of the restriction on her powers of alienation should be clearly explained to her and her assent thereto should be obtained; otherwise she may be held to be entitled to a rectification of the settlement in this respect: see *Torre* v. *Torre*, 1 Sm. & G. 518.

Trusts of Income.

against a danger to which she was exposed by the creation of the equitable doctrine of separate estate; for the property, becoming under that doctrine her property and subject to her disposal, she was exposed to the influence that might be brought upon her by her husband to induce her to alienate the provision that had been made for her, either in his favour or in that of other persons at his direction (*x*).

Effect of.

The effect of the clause is to provide "that nothing done or omitted to be done by the wife at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due:" per *Fry*, L. J., in *Re Vardon's Trusts*, 31 Ch. D. 275, at p. 280; and see *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532.

Fraud of wife.

And it has been frequently held that a married woman restrained from anticipation will not be deprived of the protection of the restraint even although she has been guilty of a fraud: *Stanley* v. *Stanley*, 7 Ch. D. 589; and notwithstanding the fact that she was herself the settlor; for the Court "having once sanctioned this species of protection to a married woman by making it impossible for her in any way to deal with the fund" [which she was restrained from anticipating], "must go on and hold her interest in the fund protected even against her own fraudulent acts:" per *Wood*, V.-C., in *Clive* v. *Carew*, 1 J. & H., at p. 206; and see *Arnold* v. *Woodhams*, L. R. 16 Eq. 29, 33; *Thomas* v. *Price*, 46 L. J. Ch. 761.

Impounding by trustees.

Income subject to this restraint cannot be applied or impounded by trustees to make good a loss occasioned by a married woman's fraud or improper conduct, *e.g.*, the costs of an action improperly brought by her: *Re Glanvill, supra.* But dividends already accrued and in the hands of the trustees before the act had been committed which gave rise to the liability of the married woman to

(*x*) See, as to the history of the restraint on anticipation, *Jackson* v. *Hobhouse*, 2 Mer. 483, at p. 487, per Lord *Eldon*, and Lewin on Trusts, 781.

Trusts of Income.

pay the costs, may be retained by the trustees to pay their costs: *ibid.*; and see *Meager* v. *Pellew*, 14 Q. B. D. 973.

Costs of proceedings improperly instituted by wife restrained from anticipation.

In *Re Andrews, Edwards* v. *Dewar*, 30 Ch. D. 159, where a married woman had improperly instituted proceedings after the Married Women's Property Act, 1882, came into operation, *Pearson*, J., held, that the restraint on anticipation (being as he said for the protection of a married woman outside the Court and not so as to enable her to do a wrong in the Court) did not prevent the Court from directing her income although not accrued to be applied in part payment of the costs of those proceedings. The Court of Appeal, while overruling the decision so far as it was based upon the grounds given by the judge, declined to express an opinion whether the Act by enabling the married woman to sue by herself without a next friend had made any alteration which would justify such an order *when all the acts giving rise to the liability to pay costs have occurred after the commencement of the Act*—whether, in fact, having given her the benefit of suing by herself, it had not imposed on her the correlative liability of all litigants to pay the costs of action if unsuccessful. And in *Re Glanvill*, 31 Ch. D. 532, the decision of *Pearson*, J., was observed on by the L.JJ. of the Court of Appeal with disapproval. The Act while it makes a married woman capable of suing and being sued in contract and tort as if she were a *feme sole*, and makes damages or costs recovered against her payable out of her separate property and not otherwise, and extends the separate estate which is to be liable for such payment, does not impose any new personal liability upon her. "She is meant to be no more capable of contracting and rendering herself liable upon contracts in respect of her separate property, which is subject to a restraint upon anticipation, than she was before:" per *Smith*, J., *Draycott* v. *Harrison*, 17 Q. B. D. 153. It was there held by the Divisional Court that the Court has no jurisdiction to order the committal of a married woman under sect. 5 of the Debtors' Act, 1869, for non-payment of a judgment debt out

Married Women's Property Act imposes no new personal liability on married women.

Trusts of Income.

of her separate property which she was restrained from anticipating, notwithstanding that since the date of the judgment she had received income from the trustees exceeding the amount of the debt and costs. The Court held that sect. 5 applied only to the case of a personal judgment, and not to one merely directing payment out of a married woman's separate estate. Having regard to sect. 19, which expressly saves the operation of the restraint upon anticipation, the only alteration which it appears to have made is to give express legislative sanction to that which had been formerly held to be the law (*London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773), that a restraint against anticipation when inserted in a settlement of a woman's own property is inoperative against her antenuptial debts. And see *Sanger* v. *Sanger*, L. R. 11 Eq. 470, where Lord *Romilly* held that the 12th section of the Married Women's Property Act, 1870, extended to property of a married woman subject to a restraint on anticipation.

Restraint limited to then intended marriage or general.

The restraint can be so limited as to be confined to the then intended or existing coverture, or so as to arise on any marriage. In each case it will be a question of the construction of the words of limitation: *Hawkes* v. *Hubback*, L. R. 11 Eq. 5. But on the termination of the coverture or of each coverture (as the case may be) the restraint determines, and the fact that on a subsequent marriage it is again to spring into existence does not prevent a woman while single from disposing as she may think fit of her interest notwithstanding the restraint: *ibid.*

Corpus of real and personal estate.

The restraint is capable of being imposed not only upon the income, but also the *corpus* of real and personal estate: *Baggett* v. *Meux*, 1 Coll. 138, 149; 1 Phil. 628; *Re Ellis' Trusts*, L. R. 17 Eq. 409, 412, 414.

Whether capital of fund transferable to legatee where bequest absolute to her separate use followed by restraint.

A question has often arisen whether, under a bequest to a married woman for her separate use absolutely, followed by a clause restraining anticipation, the capital of a fund, or of a share in a fund, can be transferred to the legatee notwithstanding the restraint on anticipation; and a distinction had

Trusts of Income.

been laid down by judges that where the gift was of an income-bearing fund the restraint was effectual, but where of a sum of cash ineffectual: see *Re Ellis' Trusts*, L. R. 17 Eq. 409; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Croughton's Trusts*, 8 Ch. D. 412. But the Court of Appeal have now laid down the rule that under such a bequest the question as to the efficacy of the restraint does not depend upon any such distinction, but whether the testator has or has not shown an intention that the trustees of his will shall keep the investment and pay the income to the married woman: *Re Bown, O'Halloran* v. *King*, 27 Ch. D. 411; and see *Gibson* v. *Way*, 32 Ch. D. 361; *Re Grey's Settlements, Acason* v. *Greenwood*, 34 Ch. D. 85. For the purposes of a clause of this character, there is no distinction between a restraint on alienation, and a restraint on anticipation: per *Chitty*, J., in *Gibson* v. *Way*, at p. 365; and see per *Bacon*, V.-C., in *Re Croughton's Trusts*, 8 Ch. D. 412.

Income-bearing fund or sum of cash.

Depends on intention of testator that the trustees should hold the fund.

No distinction between restraint on alienation and on anticipation.

But a restraint on anticipation imposed upon an estate tail limited to a married woman does not prevent her from barring the entail and acquiring an estate in fee simple to which the restraint would equally apply: *Cooper* v. *Macdonald*, 7 Ch. D. 288, 294. The barring of the entail is not really an alienation at all, but only an enlargement of the estate.

Restraint on anticipation imposed on estate tail.

As to the effect which the restraint on anticipation has upon covenants to settle after-acquired property, see *post*, p. 322.

As affecting covenants to settle after-acquired property.

The existence of a restraint on anticipation does not prevent the exercise by the Court of any powers given to it by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), sect. 50, nor by the married woman of any powers given to her by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 61 (6).

Settled Estates Act, 1877; Settled Lands Act, 1882.

It may now sometimes be advisable to extend this restriction against anticipation to cases where before it was unnecessary to do so, *i.e.*, to the life interest limited to the wife after her husband's death, and also to the ultimate absolute interest limited to her after her husband's death in default

Extension of restraint since Married Women's Property Act.

Trusts of Income.

of issue. Before the Act neither of these interests (so far at least as the personal estate is concerned) could be disposed of by the wife during coverture, because such an interest being a reversionary chose in action was not assignable at common law, and also because coming to the wife under her settlement it was excluded from the operation of Malins' Act (20 & 21 Vict. c. 57), which enabled her with the concurrence of her husband to dispose of her reversionary interests in personal estate by a deed acknowledged. But now as a woman is able during coverture to dispose of every interest in her property, whether in possession or reversion, she might in the absence of such restraint be induced by her husband's influence to dispose of the very interests which are intended by the settlement to be her support after his death.

Duty of trustees in making payment to wife.

The trustees should, strictly speaking, always pay directly to the wife, or according to her *written* direction made at (not before) the time of payment, all dividends and sums payable under the settlement to her, and should obtain from her a formal receipt. It may be that, so long as husband and wife are living together, a payment to the husband of the dividends of his wife's income as they accrue, even in the absence of any direction by the wife, will not expose the trustees to any serious responsibility; for, where the consent of the wife to the receipt and application by the husband of her income can be proved, she is not entitled to any account of it either as against the trustee who pays it to the husband, or as against the husband himself: *Caton* v. *Rideout*, 1 Mac. & G. 599, 601; *Payne* v. *Little*, 26 Beav. 1. Where such consent cannot be proved, or the inference is negatived by contradictory evidence, then she will be entitled to recover the arrears of her income: *Darkin* v. *Darkin*, 17 Beav. 578, 581; *Dixon* v. *Dixon*, 9 Ch. D. 587. And her right to recover arrears of separate estate is not limited as in the case of pin money to the period of one year: *Dixon* v. *Dixon*, *supra*. It may be convenient, where the wife is restrained from anticipation, that the settlement should expressly authorise

Trusts of Income.

the trustees to pay her income to her banker, or such other person as she may from time to time appoint, until further order, in which case the order until countermanded will protect the trustees, thus dispensing with an express direction on each occasion of payment. Sometimes, also, a clause is introduced to enable the wife prospectively to direct payment of the income to the husband until her further order (*z*).

44 & 45 Vict. c. 41, s. 39.

By the Conveyancing Act, 1881, sect. 39, it is enacted that,—

Power for Court to bind interests of married woman

"(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

"(2.) This section applies only to judgments or orders made after the commencement of this Act."

Power exerciseable only for *benefit* of married women.

The Court can exercise this power only where it is of opinion that the removal of the restraint will be for the benefit of the married woman. Notwithstanding this enactment, "there is no jurisdiction to release the income from the restraint on anticipation in all cases where the Court thinks it just to do so:" per *Fry*, L. J., in *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D., at p. 541. In *Tamplin* v. *Miller*, W. N. 1882, p. 44; 30 W. R. 422, *Hall*, V.-C., laid great stress on the same point; but he allowed her to compromise a claim in an administration action, notwithstanding a restraint. See also *Musgrave* v. *Sandeman*, 48 L. T. 215. In *Hodges* v. *Hodges*, 20 Ch. D. 749, *Fry*, J., removed the restraint in order to pay the debts of a married woman past child-bearing. But in *Re Warren's Settlement* (W. N. 1883, p. 125; 49 L. T. 696), the Court of Appeal

(*z*) Although it would seem to be the better opinion that, even without such express authority, trustees may safely under the common form of settlement, notwithstanding a restraint on anticipation, pay to the husband, acting upon a prospective direction of the wife, or even in the absence of any direction (see Davidson, Prec. Conv., 3rd Ed., Vol. III., p. 79 n.); it may nevertheless be advisable, for the sake of avoiding dispute or question, to take the precaution suggested in the text.

Trusts of Income.

refused to presume a woman to be past child-bearing though she was fifty years of age, and had been married for twenty-eight years without ever having had a child. In that case the Court again laid down that the enactment now under consideration does not empower the Court generally to remove a restraint on anticipation, but only to bind a disposition by a married woman which the Court considers is for her benefit. So an offer for the purchase of a wife's interest which was proved to be advantageous to her has been sanctioned: *Re Flood's Trusts,* 11 L. R. Ir. 355. In *Gibson* v. *Way,* 32 Ch. D. 361, *Chitty,* J., removed the restraint so as to enable an exchange to be made of a portion of the estate, and also to effect a partition and resettlement of the estate with powers of leasing. In *Re Little's Will,* 36 Ch. D. 701, the Court of Appeal made an order enabling a married woman to mortgage a life interest, as to which she was restrained from anticipation, without requiring the trustees to be served. In *Ex parte Thompson,* W. N. 1884, p. 28, a similar order was made where money was needed to carry on a business the property of the wife. In *Re Jordan,* 34 W. R. 270, *Pearson,* J., refused an application by a married woman for release from the restraint, on the ground that it might involve a forfeiture of her life interest.

In *Re C.'s Settlement,* 56 L. T. 299, where a wife had given acceptances to creditors of her husband (who had been adjudged a bankrupt), and was harassed by actions, an order was made releasing part of the wife's income from restraint for the purpose of raising a sum to satisfy the creditors. But it may well be doubted whether the Court would, except under special circumstances, exercise its jurisdiction under this section, which is purely discretionary, to relieve a wife from the consequences of her own extravagance.

5. Provisions for Children and Issue.

Power to Appoint to Children, &c. (*a*).]—After the death of the husband and wife, follow limitations in favour of the issue of the marriage. As a general rule, the trustees are directed to hold the settled fund (including in that term all property brought into settlement by the husband and wife respectively) in trust for the children of the marriage, or remoter issue as the husband and wife shall jointly by deed appoint; and, in default of, and subject to any such appointment, as the survivor shall by deed or will appoint. Limitations in favour of issue.

It is advisable to extend the power of appointment, so as to include, not only the children of the marriage, but also the remoter issue. An appointment can thus be made directly in favour of grandchildren, whose parents may have died in the lifetime of the donees, or of the surviving donee of the power, or a settlement may be made upon the parent for life or for a shorter period, and subject thereto the property may be appointed among his or her children. Grandchildren are not objects of a power to appoint among children: *Alexander* v. *Alexander*, 2 Ves. sen. 640. Power of appointment should extend to remoter issue.

An appointment by will in favour of a child is not protected from lapse by sect. 33 of the Wills Act (1 Vict. c. 26), in the event of the death of that child in the lifetime of the donee of the power (*b*), and the appointed share would not in that case form part of that child's estate, but would go as unappointed among the surviving objects of the power: *Holyland* v. *Lewin*, 26 Ch. D. 266: see *Griffiths* v. *Gale*, 12 Sim. 354. Lapse.

Prior to the Act of 37 & 38 Vict. c. 37 (passed on the 30th July, 1874), where, as was generally the case, the settlors desired to authorise what is Exclusive appointments.

(*a*) As to powers of appointment generally and their exercise, see *ante*, sub tit. "Appointments," Vol. I., pp. 731 *et seq.*; see also Vaizey on Settlements, Vol. I., pp. 341 *et seq.*

(*b*) See sect. 33 set out fully, *post*, sub tit. "Wills," Vol. VII., p. 480.

Provisions for Children and Issue.

commonly termed an "exclusive appointment," it was necessary that the donees of the power should be expressly empowered to appoint in favour of one or more of the objects of the power to the exclusion of the other or others.

Illusory Appointments Act.

Formerly an appointment under a non-exclusive power to one of the objects of an unsubstantial part of the property (which was called an illusory appointment) was invalid; but by the stat. 11 Geo. 4 & 1 Will. 4, c. 46, no appointment made after the 16th July, 1830, was to be invalid or impeached in equity on the ground that only an illusory share had been appointed or left unappointed to devolve upon any one or more of the objects of the power. In consequence of this Act any appointment giving the bulk of the property to one or more of the objects, and giving or leaving unappointed the most trifling amount in favour of the other objects, was held good.

This Act, although substantially enabling the exclusion of any object, caused a risk of the whole appointment being defeated by an accidental omission of some infinitesimal appointment in favour of objects who were not intended to be benefited.

Every power now exclusive *primâ facie*.

Now, by the 37 & 38 Vict. c. 37, every power of appointment, unless by the instrument creating it the exclusion of any object or objects is directly or indirectly prohibited, will be an exclusive power; and there is now, therefore, no longer any necessity to create an expressly exclusive power. The enactments here referred to are set out fully, and their effect is considered *ante*, sub tit. "APPOINTMENTS," Vol. I., pp. 755 *et seq.*

Usual form of power.

The power of appointment in favour of the issue of the marriage, as usually limited by the practice of conveyancers, and as limited in the precedents adopted in this volume, is of a very extensive character. It is made exerciseable at such age or ages, at such time or times, if there are more than one child in such shares, and with such executory and other trusts for their respective benefit, and such provisions for advancement,—or sometimes in more general terms, *e.g.*, in such shares and in such manner in all respects,—as the husband and wife shall

Provisions for Children and Issue.

jointly by deed or deeds, revocable or irrevocable (*c*), appoint, and in default of and subject to any such appointment as the survivor of them shall in like manner or by will or codicil appoint. Under such a power the donee will be able to appoint an estate for life to one child with cross limitations over among the other objects of the power as he thinks fit; may make the shares vest at such time as may be most beneficial to the object (always bearing in mind the rule against perpetuity); and may limit the interest of the appointee till his bankruptcy, or any other event which would have the effect of defeating the beneficial enjoyment by the appointee.

Authority to donee to make provisions for maintenance and education.

The usual form of power also expressly authorised the donee to make provisions for the maintenance, education, and advancement of the objects of the power. Where settlements contain express provisions for maintenance, &c., such provisions are usually framed so as to apply only to the interests taken by the children in default of appointment, and might not, perhaps, be held generally to extend to appointed interests, which are by the appointment withdrawn from the settlement: but see *White* v. *Grane*, 18 Beav. 571. It seems, indeed, clear that, as a general rule, the statutory powers of applying the income of the property of infants for their maintenance and education given by the Conveyancing and Law of Property Act, 1881 (as to which see *post*, pp. 304 *et seq.*), would authorise trustees to apply the income of an appointed fund for the maintenance or education of infant appointees: see Vaizey on Settlements, Vol. II., p. 1217; but in some cases, the same reasons which render advisable the insertion of express maintenance clauses in settlements (as to which see *post*, p. 307), will make it also advisable to insert in powers of appointment express authority to make provisions for maintenance and education of the objects. The statutory power

(*c*) As a married woman can now execute a deed, the expression "writing sealed and delivered," formerly used with reference to her supposed incapacity to execute a deed, may now be dropped.

Provisions for Children and Issue.

authorises trustees either to themselves apply the money for these purposes, or to pay it to the parents or guardians of the infants.

Authority to make provisions for advancement.

As regards advancement, express authority must be given to the donee of the power, if he is intended to be able to make provision in the appointment. And it would seem advisable still to retain the few words which expressly authorise him to make provisions for maintenance and education, both as indicating the extent of the donee's power, and also as enabling him to frame provisions which are not identical with those contained in the statute, should circumstances at the time of the appointment render such a course expedient. The amount to be applied for maintenance, education, and advancement is usually left to the discretion of the donee of the power.

Reservation of a power of revocation and new appointment.

Under a simple power of appointment, the donee of the power, even though not expressly authorised so to do by the deed creating the power, may, in the deed executing the power, reserve to himself a power of revocation and new appointment. The insertion, however, of an express authority for that purpose is useful as reminding the donee of the nature and extent of his power. If, on the execution of the original power of appointment, a power of revocation only is reserved, on the exercise of that power, the original power remains unaffected; and if, in the first instrument executing the original power, a power of revocation and new appointment is reserved, that instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted and at an end, but, upon revocation of the later instrument, exists in full force, and may be exercised in the manner authorised by the original instrument: *Saunders* v. *Evans*, 8 H. L. Cas. 721.

Power of appointment by deed or will to survivor.

In default of the exercise of the joint power, and subject to any partial appointment thereunder, a power of appointment by deed or deeds, revocable or irrevocable, or by will, is limited to the survivor.

Form of power to wife if sur-

Before the Married Women's Property Act, 1882, express power was conferred on the wife, if survivor,

of appointing by deed or will, whether covert or sole, so as to meet the case of her contracting a second marriage. But these words are, since the Act, no longer required, and they may accordingly be omitted.

vivor before Married Women's Property Act.

Trust for Children in default of Appointment.]—After the clauses conferring the powers of appointment, comes the trust for the division of the whole trust fund, in default of any appointment, or of so much thereof as may not have been exhausted by any partial appointment, among such of the children of the marriage as, being sons, attain twenty-one, or being daughters, attain that age or marry under that age. "The attainment of twenty-one, or marriage in the case of daughters, is as a general rule in English settlements made the decisive test as to whether the children shall take or not": *Chamberlain* v. *Napier*, 15 Ch. D. at p. 632.

Ultimate gift in default of appointment.

Sometimes the consent of the parents or parent, guardians or trustees, is made a condition precedent to the marriage of any infant daughter. Where the consent of parents is required, if at the time of the marriage one of the parents is dead, the consent of the surviving parent would apparently be sufficient: *Re Brown's Will and Settlement*, 18 Ch. D. 61, 76; and if both were dead then probably the absence of consent would be immaterial: *ibid.*; and see *Dawson* v. *Oliver Massey*, 2 Ch. D. 753.

Consent to marriage.

Effect of death of one or all persons to consent.

Parents.

But where the consent required is that of guardians or trustees, their temporary non-existence does not render the condition inoperative, and the consent of a guardian appointed by the infant herself will not suffice: *ibid.*; *Re Brown's Will and Settlement*, *supra*.

Guardians and trustees.

Hotchpot Clause.]—In the absence of a direction to the contrary, either express or necessarily implied, in the instrument of appointment, an object of the power, in whose favour an appointment has been made, may nevertheless claim an equal share with the other objects in any part of the trust fund remaining unappointed: *Maddison* v. *Andrew*, 1

Right of appointee to share in residue.

Provisions for Children and Issue.

Ves. sen. 57 ; see Sugden on Powers, 639 ; *Fordyce* v. *Bridges*, 2 Phill. 497 ; *Walmsley* v. *Vaughan*, 1 De G. & J. 114.

Hotchpot clause.

To prevent an appointee from gaining such an undue advantage over the other objects of the power, an express clause (known as the hotchpot clause) is generally inserted in settlements, immediately following the trust in default of appointment, that no child to whom, or (where the power extends to issue) to whose issue, a share is appointed, shall take any share of the unappointed part, until each of the other objects of the power has received a share equal to that appointed to him or his issue. This clause is itself modified so as to enable the appointor or appointors, when making an appointment, to exclude the application, in any particular instance, of the hotchpot clause. The doctrine of "hotchpot" applies only to children, the object being to make children bring into account advancements. And, where hotchpot is directed, advances made by a testator in his lifetime will have to be brought into account, but not so as to increase the share of a stranger, *e.g.*, the testator's widow. A stranger is not liable to account for advances made to him, and therefore is not within the meaning of a clause which is to make the children account for advancements : *Stewart* v. *Stewart*, 15 Ch. D. 539, 547 : see *Meinertzhagen* v. *Walters*, L. R. 7 Ch. 670. See as to advancements, *post*, pp. 311 *et seq.*

Maintenance, &c.

Maintenance and Accumulation.]—By sect. 43 of the Conveyancing Act, 1881, it is enacted that :

"(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian (if any), or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

"(2.) The trustees shall accumulate all the residue of the

income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

Provisions for Children and Issue.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act."

This section is substituted for the provisions contained in Lord Cranworth's Act (23 & 24 Vict. c. 145), sect. 26, now repealed, which enacted that:

"In all cases where any property is held by trustees in trust for an infant either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age," the trustee may apply "for or towards the maintenance or education of such infant the whole or any part *of the income to which such infant may be entitled in respect of such property*," &c.

Lord Cranworth's Act, s. 26.

These enactments are very similar, the principal difference being that whereas under Lord Cranworth's Act the fund applicable for maintenance was "the whole or any part of the income to which the infant may be entitled in respect of such property;" the description given in the Conveyancing Act is "the income of that property or any part thereof." But this later enactment appears to make no difference in the law, and not to have been introduced for the purpose of extending the provisions of the earlier Act. Sect. 43 of the Act of 1881 was introduced "possibly with a view to codify the law": per *Cotton*, L. J., *Re Dickson, Hill* v. *Grant*, 29 Ch. D. at p. 336.

Under the earlier Act it had been decided that an infant was not entitled to maintenance out of a

Statutory power of maintenance

Provisions for Children and Issue.

does not apply where infant's interest is contingent.

legacy contingent upon his attaining twenty-one, because as a contingent legacy does not (except when the testator is the parent or *in loco parentis* to the legatee (*d*)) carry interest until the happening of the contingency, and the interim interest unless expressly given to the person contingently entitled to the legacy belongs to the residuary legatee, the infant would not on attaining twenty-one become entitled to the intermediate income as well as to the corpus of the legacy: *Re George*, 5 Ch. D. 837. The later statute has made no difference in this respect, and an infant will only be entitled to maintenance out of the income in cases where "the income will go along with the capital, if and when the capital vests." See Wolst. & Turn. Conv. Acts, p. 101, quoted with approval by *Kay*, J., in *Re Dickson, Hill* v. *Grant*, 28 Ch. D. at p. 295, affirmed 29 Ch. D. 331; and see *Re Judkin's Trusts*, 25 Ch. D. 743. When therefore the interest of an infant is contingent, an express maintenance clause must generally be inserted, if desired.

If the contingent legacy is by the will directed to be set apart so as to be held for the benefit of the infant, and so that the income shall go to the infant if he attains twenty-one, and if not, then to the person to whom the legacy is given, then and then only apparently, the section will apply to a contingent legacy: see per *Cotton*, L. J., *Re Dickson, Hill* v. *Grant*, 29 Ch. D. at p. 337.

Statutory provisions as to accumulation.

The provision of sub-sect. 2 as to the accumulation of the residue of the income not applied in maintenance is substantially the same as that in sect. 26 of the earlier Act, and consequently the decisions on that section will be applicable to the present section.

It was held in *Re Buckley's Trusts*, 22 Ch. D. 583, that the operation of the clause as to accumulation in Lord Cranworth's Act was confined to the two cases of (1) an absolute legacy and (2) a contingent legacy, and that it had no application to the

(*d*) In this case, whether the legacy be vested or contingent, if no other maintenance is provided by the will, interest will run from the death of the testator: *Harvey* v. *Harvey*, 2 P. Wms. 21.

Provisions for Children and Issue.

case of a gift absolute in the first instance, but liable to be defeated on the happening of some future event, in which case (apart from the Act) the accumulations of the income of that gift would go until the defeasances to the person entitled, unless the defeasance happened. Consequently, where property was bequeathed to trustees in trust for an infant but with a proviso that if the infant should not attain twenty-one, the property should become part of the testator's residuary estate and the testator incorporated sect. 26 of Lord Cranworth's Act, *Fry*, J., held that the representatives of the infant who died under twenty-one were not deprived by the section of the right which they had to the accumulations of income down to the infant's death, but were entitled thereto to the exclusion of the residuary legatees notwithstanding that such residuary legatees "ultimately become entitled to the property from which the accumulations arose." See *Taylor* v. *Johnson*, 2 P. Wms. 504.

Where vesting is postponed beyond twenty-one express powers must be given.

It is obvious that the provisions of this section do not apply to a case where the vesting is postponed beyond twenty-one: see *Re Judkin's Trusts*, 25 Ch. D. 743. The postponement of vesting cannot be validly directed by an ante-nuptial settlement, having regard to the rule against perpetuities, but in post-nuptial settlements, where such a limitation could be legally introduced in a case where such an interest is limited, these express powers of maintenance must be inserted.

Discretionary power or trust.

The section confers on trustees a discretionary power of maintenance and not a trust. Where express provisions are introduced in the settlement the maintenance clause must be examined to see whether there is a *trust* for the maintenance of the children such as would enable the father to insist on the trust fund being applied for that purpose although he is able to maintain them. "If there is such a trust he is entitled to have the children maintained out of the trust fund, if there is no such trust he is not:" per *Lindley*, L.J., in *Wilson* v. *Turner*, 22 Ch. D. at p. 527; and if, in the case of a trust, the father has himself maintained his

Provisions for Children and Issue.

children without resort to the fund subject to such trust, he is considered a purchaser of so much of the fund as would have been properly applicable for maintenance: *Mundy* v. *Earl Howe*, 4 Br. C. C. 223; *Stocken* v. *Stocken*, 4 My. & Cr. 95; 4 Sim. 152. But this rule only applies where the trust for maintenance is contained in an ante-nuptial settlement, and will not be extended to voluntary settlements: *Re Kerrison's Trusts*, L. R. 12 Eq. 422.

Usual form of express maintenance clause, where inserted.

Where an express maintenance clause is inserted, the form usually adopted is of the nature of a trust, to take effect after the death of husband and wife; but, where the husband does not take a life interest, and it is desired to provide maintenance after the death of the wife, it may be advisable (if it be the intention) to confer upon the trustees in express terms a power only, and not impose a trust, so as to exclude any claim by the husband to have his children maintained out of the trust funds notwithstanding his ability to maintain them. But it would appear that even under a direction in the ordinary form to the trustees "to apply the whole or such part as they shall think fit of the annual income for or towards the maintenance of the children" the trustees would not be *bound* to apply any part for maintenance, and the direction will be treated not as a trust, but as a discretionary power in the trustees, and they will not be justified in paying the income over to the infant's guardian, but must exercise a discretion whether any and if so what maintenance should be allowed: *Wilson* v. *Turner*, 22 Ch. D. 521.

Duty of trustees to exercise discretion under a direction to maintain.

The fact that a benefit to the infant will benefit the parent not to fetter discretion of trustees.

Trustees in exercising this discretion must consider and do what is most for the benefit of the infant; and the fact that the benefit to the infant will or may also benefit the parents should not deter them in the exercise of their discretion. Where the trustees exercise their discretion honestly and *bonâ fide* the Court will be very slow to interfere: *Brophy* v. *Bellamy*, L. R. 8 Ch. 798; *Gisborne* v. *Gisborne*, 2 App. Ca. 300.

Interference of Court with exercise of discretion by trustees.

The distinction between the cases where the Court will and where it will not interfere is thus laid down by *Jessel*, M.R., when sitting in the Court of Appeal

in *Tempest* v. *Lord Camoys*, 21 Ch. D. at p. 578: "It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power the Court does not enforce the exercise of the power against the wish of the trustees but it does prevent them from exercising it improperly. The Court says that the power, if exercised at all, is to be properly exercised. But in all cases where there is a trust or duty coupled with the power, the Court will then compel the trustees to carry it out in a proper manner, and within a reasonable time. In the present case there was a power which amounts to a trust to invest the fund in question in the purchase of land. The trustees would not be allowed by the Court to disregard that trust, and if (one of the trustees) had refused to invest the money in land at all the Court would have found no difficulty in interfering. But that is a very different thing from saying that the Court ought to take from the trustees their uncontrolled discretion as to the particular time for the investment and the particular property which should be purchased." So it is doubtful whether the Court could attempt to contest the discretion of the trustees as to the amount to be allowed for maintenance, so long as that discretion was honestly exercised: *Re Lofthouse*, 29 Ch. D. 921. And see *Re Roper's Trusts*, 11 Ch. D. 272; see also *Re Hodge's Estate*, 7 Ch. D. 54.

Provisions for Children and Issue.

It is to be noticed that sect. 42, cl. 4, of the Act confers on trustees a similar discretionary power of maintenance out of the income of *land* which under the power of the Act they may be managing during the minority of the person beneficially entitled to the property, and by cl. 5, directs the accumulation of the investments representing the residue of the income, and the destination of the accumulated fund. This is not disposed of in precisely the same way as that arising under sect. 43, and where land is settled express provisoes should be inserted. See sub tit. "Wills," Vol. VII., p. 918, note (*o*).

Conveyancing Act, s. 42, maintenance out of income of land, and accumulation of residue.

Both these sections apply "only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises."

Contrary intention.

Provisions for Children and Issue.

A direction to accumulate the income until the presumptive shares of the children were payable, was held not to be an expression of a contrary intention: *Re Thatcher's Trusts*, 26 Ch. D. 426. Sect. 42 applies only where the instrument comes into operation after the commencement of the Act (31st Dec. 1881), while sect. 43 applies whether the instrument comes into operation before or after 1881.

Payment for maintenance out of funds directed to be accumulated.

The Court has in many cases, notwithstanding a trust for accumulation, ordered a sum to be paid out of a fund so directed to be accumulated for the maintenance or education of the person who is to succeed to the property. This it has done on the principle that where a testator has made a provision for a family, but has postponed the enjoyment, *e.g.*, to accumulate for the payment off of incumbrances, or merely to increase the estate, the Court assumes that he did not intend those children to be left unprovided for, or without the means of being educated for the position which he designs them eventually to occupy; and from the earliest time the Court has held that maintenance ought to be provided for an heir-at-law who is unprovided for: see *Re Allan*, *Havelock* v. *Havelock*, 17 Ch. D. 807; *Collins* v. *Collins*, 32 Ch. D. 229. But there must be special circumstances to justify the Court in exercising such a discretion: *Re Alford*, *Hunt* v. *Parry*, 32 Ch. D. 383.

Court making provision for eldest son out of trust money in its hands.

When the Court, having trust money in its hands, is making a provision for the eldest son of a family by way of maintenance, it often gives a larger sum than is actually necessary for the maintenance of that son, on the ground that the fitting maintenance and education of his brothers and sisters is for the benefit of that eldest son: *Petre* v. *Petre*, 3 Atk. 511; *Wellesley* v. *Beaufort*, 2 Russ. 28.

Charge on infant's real estate for maintenance.

The Court has often been asked to charge the corpus of real estates of infants with money supplied for their maintenance. In the case of *Re Howarth*, L. R. 8 Ch. 415, the Court of Appeal held that they had jurisdiction to make an order charging the expenses of the past maintenance of an infant upon a freehold estate to which he was

Provisions for Children and Issue.

entitled in fee simple in possession. This case was decided on the principle that a person who had maintained an infant could obtain a judgment against him for necessaries, which judgment would bind the inheritance, and that the order asked for substantially came to the same thing. But that case has been doubted, and the jurisdiction of the Court apparently is limited to the simple case where the infant is tenant in fee simple in possession, and the application is for his own past maintenance only: *Re Hamilton*, 31 Ch. D. 291; *Cadman* v. *Cadman*, 33 Ch. D. 397.

Advancement clause.

Advancement.]—There is no statutory power of advancement. The settlement must contain an express advancement clause, if such is the intention of the settlor. The trustees are, as a general rule, empowered, with the written consent of husband and wife during their joint lives, and of the survivor during his or her life, and after the death of the survivor at their own discretion, to advance to a child or a child's issue a portion (usually not exceeding one-half) of the share, whether vested or expectant, of such child or issue, either under the original trusts or under any appointment which may be made thereunder, for the advancement and preferment in life of such child or issue.

Meaning of "advancement."

The word "advancement" has a distinct legal meaning, *i.e.*, that a certain portion of the trust fund is actually taken out of the settlement and paid over to the object of the power: *Re Gosset's Settlement*, 19 Beav. 529, 535, where *Romilly*, M.R., draws a distinction between an advancement and an appointment, the former meaning "that a certain portion of the fund is actually taken out of the settlement altogether and paid over to the object of the power," the latter dealing only with the reversion of the fund, leaving the previous life interests untouched. This power is an overriding power, and consequently the fact that the wife's life interest in the trust funds is subject to a restraint on anticipation, does not prevent an advance being made out of the trust funds during her life—assuming, of

Provisions for Children and Issue.

course, that the power is by the settlement exerciseable during her marriage.

An advancement must be made with a view to making some permanent provision for the object, or his establishment in life, as opposed to a small or merely temporary benefit; and trustees must be careful not, in assumed exercise of this power, to apply part of the trust funds for some purpose not authorised by the power. The precise terms of the power will be looked at in each case as a guide. Thus in *Lowther* v. *Bentinck*, L. R. 19 Eq. 166, where the power (in a will) was to apply a portion of a legacy bequeathed to L. for life, and after his death for his children "in or towards the preferment or advancement of L., or otherwise for his benefit as the trustees should think fit," *Jessel*, M.R., held that the words "or otherwise for his benefit" were not to be read as merely *ejusdem generis* with the preceding words, but that they were larger than "preferment and advancement," and were inserted expressly to extend the powers of the trustees, and justified them in paying off the debts of L.

Payment of part of funds to daughter on marriage.

A payment of part of trust funds to a daughter on her marriage was held authorised by a power of advancement for putting or placing the issue of the marriage "to any profession, trade, or business, or for their advancement in life": *Lloyd* v. *Cocker*, 27 Beav. 645.

Payment to trustees of son's settlement.

So a power in a marriage settlement of advancement to a son of the marriage "for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world," was held to authorise the payment of part of the trust funds to the trustees of a post-nuptial settlement of the son in favour of himself, his wife, and the issue of the marriage, neither the son nor his wife being entitled to any property producing an immediate income, and the son being a law student, unable to be called immediately to the bar: *Roper Curzon* v. *Roper Curzon*, L. R. 11 Eq. 452.

Establishment in business of

And the establishment in business of the husband of an object of the power was held justified by a

Provisions for Children and Issue.

power "to apply at any period or periods of the life of each daughter for her advancement, or otherwise for her benefit": *Re Kershaw's Trusts*, L. R. 6 Eq. 322. So also in the case of a married woman, herself an object of the power, her husband covenanting that the business should be for her separate use, where there was a power of advancement for setting up the testator's children in business: *Talbot* v. *Marshfield*, L. R. 3 Ch. 622; the Court, however, held in the latter case, that a payment to one of the testator's married daughters, to enable her to pay her husband's debts, was not a proper advancement.

husband of object of power.

Advancement by portion, Statute of Distribution.

The view of the Courts as to what payments constitute an advancement may be ascertained from a review of some of the cases where the question for decision has been what payments were and what were not "advancements by portion" within the meaning of the Statute of Distribution (22 & 23 Car. 2, c. 10). In *Taylor* v. *Taylor*, L. R. 20 Eq. 155, *Jessel*, M. R., held that the following were "advancements by portion":—(1) payment of the admission fee to one of the Inns of Court in the case of a son A. intended for the bar; (2) the price of a commission and outfit of A. on entering the army; (3) the money paid for plant and machinery and the payment of wages incurred by A. for the purpose of carrying on experiments in searching for minerals with a view to carrying on mining operations; but not the following:—(a) payment of a fee to a special pleader for A.; (b) price of outfit and passage-money of A. (an officer) and his wife on going to India; (c) payment of A.'s debts the payment of which was necessary to enable him to keep his position in the army; and (d) sums paid from time to time to B., another son, in some cases amounting to 200*l.* at one time, but not in pursuance of any agreement to assist him in housekeeping and paying expenses of living.

With regard to item (c), *Pearson*, J., in a case of *Blockley* v. *Blockley*, 29 Ch. D. 250, a case also under the Act, differed from the decision in *Taylor* v. *Taylor*, and, following a decision of *Wood*, V.-C., in *Boyd* v. *Boyd*, L. R. 4 Eq. 305, held that a pay-

Provisions for Children and Issue.

ment by a father of a debt of his son (1,200*l.*) was an advancement by portion.

In *Boyd* v. *Boyd*, V.-C. *Wood* said that "whenever a sum is paid for a particular purpose which is thought good and right by the father, and which the son himself desires, if it be money drawn out in considerable amount, and not a small sum, it must be treated as an advancement": L. R. 4 Eq. p. 308.

Payment made at once, or during life of donor.

An advancement must be a payment made at once, or during the life of the donor. Where, therefore, a testator gave a promissory note for payment by instalments, and some of the instalments fell due during his life and were paid by him, and others falling due after his death were paid by his executors, the former payments only were held to be "advancements," and the latter to be debts due to the testator's estate: *Re Whitehouse*, *Whitehouse* v. *Edwards*, 37 Ch. D. 683; see *Auster* v. *Powell*, 1 De G., J. & S. 99.

Insertion of hotchpot clause into advancement.

The power of advancement relates to the presumptive or expectant or vested share of the child, *i.e.*, the share which the child will take in default of the exercise either of the joint or of the sole power of appointment limited by the settlement: consequently an advancement will not fall within the operation of the ordinary hotchpot clause, which relates to appointed shares. If, therefore, it be desired that an advancement made in favour of any child shall be taken into account in estimating the value of that child's share in the unappointed fund, it will be necessary to insert some express provision to that effect.

Advancement "acceleration of title by extinction of prior interests," Succession Duty Act, 1853, s. 15.

Where during the lives of the tenants for life the power of advancement has been exercised, it operates as "an acceleration of title by the extinction of prior interests" within sect. 15 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51); and succession duty is payable as well on the part of the trust fund appointed and paid over by way of advancement, as on the part left unappointed: *Ex parte Sitwell*, *Re Drury Lowe's Marriage Settlement*, 21 Q. B. D. 466.

Power of

Where the consent of the tenant for life is neces-

sary to enable the trustee to make an advancement, if the tenant for life has become bankrupt, or has assigned his property for the benefit of his creditors, the power of consent to an advancement is not extinguished by the bankruptcy, but can only be exercised with the consent of the trustee in bankruptcy, acting with the sanction of the Court of Bankruptcy: *Re Cooper, Cooper* v. *Slight*, 27 Ch. D. 565; and see *Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdell* v. *Hammersley*, 31 Beav. 255; *Alexander* v. *Mills*, L. R. 6 Ch. 124.

consent to advancement not extinguished by bankruptcy of person whose consent is required.

6. Ultimate Trusts in Default of Issue.

The settlement then goes on to provide what, in the event of there being no children who live to attain a vested interest under the preceding trusts, is to be the ultimate destination of the trust property. As a general rule it is directed to revert to the husband or wife, as the case may be, who brought it into settlement. Where both the husband and the wife have settled property, the husband's fund will revert to him, while hers will in like manner revert to her. Where any person other than the husband and wife has brought property into the settlement, the ultimate limitation of that property must depend upon the intention of the settlor, and no general rule can be laid down as applicable to such cases.

Ultimate trusts in default of children.

The ultimate trust of the husband's property will be for him, his *executors, administrators, and assigns,* or for him *absolutely;* but these additional words are immaterial, a trust of personal estate for A., without anything more, will carry the whole interest to him absolutely, which will become part of his estate.

Trust of property settled by husband.

As regards the property of the wife, the limitations are somewhat more complicated. The better form of limitation is generally admitted now to be, to give her, in the first instance, a power of appointment over it by will only during the coverture, and by deed or will while discovert. The effect of this is to prevent her making any disposition in favour

By wife.

Ultimate Trusts.

of her husband during the coverture except by will, and at the same time to give her absolute power over her own property in the event of her surviving her husband or of the marriage being dissolved by divorce. Sometimes the testamentary power conferred on her was made exercisable only in the event of her death during coverture. But this was attended with the inconvenience that if she survived her husband the power could not be exercised, and an appointment made during the coverture became ineffectual upon her husband's death: *Willock* v. *Noble*, L. R. 7 H. L. 580.

Power of appointment should be limited to wife with reference to continuance of the marriage, and not the life or death of husband.

It is important also that the events, on which the power of appointment is given to the wife, should have reference to the continuance and the discontinuance of the coverture, and not the life and death of the husband. For if, as has been sometimes done, her power of appointment be limited to her in the event of her dying in the lifetime of her husband, or surviving her husband, then, although the marriage might be dissolved in consequence of her husband's misconduct, still so long as he lived her power would not be exercisable, and consequently she would not be able to acquire the property unless she survived not only the determination of the marriage, but also the death of her husband. The dissolution of the marriage, although it determines the coverture, so that where a reversionary interest fell into possession after the date of the divorce the wife's executors were held entitled to it to the exclusion of the husband whose right to reduce it into possession had ceased (*Wilkinson* v. *Gibson*, L. R. 4 Eq. 162; *Wells* v. *Malbon*, 31 Beav. 48), does not determine the operation of the settlement nor forfeit the interest of the guilty party: *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; *Burton* v. *Sturgeon*, 2 Ch. D. 318. But the Court has power when making an order for the dissolution of marriage to modify the settlement. The Divorce Act (22 & 23 Vict. c. 61), sect. 5, enacts that—

Effect of divorce on settlement.

22 & 23 Vict. c. 61.

"The Court after a final decree of nullity of marriage may inquire into the existence of ante-nuptial or post nuptial settlements made on the parties whose marriage is the subject of the

decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage, or of their respective parents as to the Court shall seem fit."

Ultimate Trusts.

Power exercisable now at absolute discretion of Court.

41 Vict. c. 19, s. 3.

The power conferred by this section was held by subsequent decisions to be exercisable only where there was some issue of the marriage living: *Thomas* v. *Thomas*, 2 Sw. & Tr. 89; *Bird* v. *Bird*, L. R. 1 P. & D. 231; *Corrance* v. *Corrance*, ibid. p. 495; *Dempster* v. *Dempster*, 31 L. J. (P. & M.) 113. The Matrimonial Causes Act, 1878 (41 Vict. c. 19), which came into operation 27 May, 1878, by sect. 3 made this power exercisable by the Court "notwithstanding that there are no children of the marriage." See *Yglesias* v. *Yglesias*, 4 P. D. 71. In the case of *Wigney* v. *Wigney*, 7 P. D. 177, the Court of Appeal held that the judge of the Divorce Division had an absolute judicial discretion as to the provisions to be made for the parties respectively out of the settled property, and further that, although the power given to the Court of modifying settlements was not given for the purpose of punishing the guilty party, but of making due provision for the parties, their conduct was to be taken into consideration for the purpose of seeing what provisions it was reasonable to make.

The Court, under sect. 5 of 22 & 23 Vict. c. 61, has jurisdiction to extinguish the guilty party's power of appointment under the settlement: *Bosville* v. *Bosville and Craven*, 13 P. D. 76; and in the same case the Court extinguished all such party's reversionary interest as if she were then dead; but as she was allowed to retain a certain part of the income which had been settled upon her, refused to interfere with her power of appointing new trustees: ibid. *Butt*, J., doubted whether the Act gave him power to interfere with such last-mentioned power.

Trust in default of appointment, for wife surviving husband absolutely.

Then, in default of and subject to any such appointment as above mentioned, the trust proceeds to meet the two alternatives of the wife surviving her husband, or dying in his lifetime. In the former

Ultimate Trusts.

event the fund is directed to be held in trust for her absolutely; but now, having regard to the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), for the reasons before stated (see *ante*, pp. 295, 296), it seems advisable that a restraint upon anticipation should be annexed to the ultimate interest of the wife confined to the then intended coverture.

Restraint on anticipation.

Trusts in event of wife predeceasing her husband.

If she predecease her husband the trust fund is directed to be distributed among her next of kin or such persons as would have become entitled to it under the Statute of Distributions at her death if she had died possessed thereof intestate and *without having been married.*

Use of word "unmarried."

The word "unmarried" should not be used, inasmuch as being "one of flexible meaning" it will cause doubt in each case as to the particular meaning to be attributed to it. It has been construed (1) as meaning "not having a husband" at the time when the gift takes effect: *Pratt* v. *Matthew*, 8 De G. M. & G. 522, a case of settlement; *Re Lesingham's Trusts*, 24 Ch. D. 703; the last was a case of a will where the words were "if she be then sole and unmarried," and where the marriage had been dissolved. And (2) the meaning has been judicially stated to be "never having been married:" *Clark* v. *Colls*, 9 H. L. Ca. 601; *Dalrymple* v. *Hall*, 16 Ch. D. 715; *Re Sergeant, Mertens* v. *Walley*, 26 Ch. D. 575; and *Blundell* v. *De Falbe*, 57 L. J. Rep. (Ch.) 576. Each meaning has been judicially stated to be the primary meaning. The whole of the trust being in default of children taking any vested interest, the use of the fuller and more precise phrase, "without having been married," will not in the case of the settlement of a *spinster* cause the difficulty which occurred in the case of *Emmins* v. *Bradford*, 13 Ch. D. 493, where by a settlement made on the subsequent marriage of a *widow* who had then three children by her former marriage (the settlement reciting that fact but making no further reference to them) trust property was settled in trust, subject to the widow's life interest, and to a power of appointment, which was never exercised, and to trusts for the issue of the then intended marriage, for the persons who

Ultimate Trusts.

would have become entitled thereto by virtue of the statute if she had died possessed thereof without ever having been married. There *Jessel*, M.R., disapproving of two former decisions of *Fry*, J., in *Re Ball's Trusts*, 11 Ch. D. 270, and *Upton* v. *Brown*, 12 Ch. D. 872 (*e*), decided that in the absence of any context the words must have their natural signification given to them, and that, notwithstanding the children of the former marriage survived their mother, the trust property went to the persons who would have been entitled to it if she had died a spinster.

Marriage of widow having children of former marriage living.

Where a widow contracts a second marriage, having children then living by her former marriage, the ultimate gift over must be so framed as to make the default of children apply to the children of the former, as well as to the then intended marriage. And so where a settlement is made on the subsequent marriage of the mother of an illegitimate child if such child is intended to be provided for by the settlement.

When next of kin to be ascertained.

The time when the next of kin of the wife are to be ascertained will depend upon the words used in the particular clause. The clause worded as above will point out the time as being the death of the lady. The object of this limitation is to exclude the husband, but there is no intention to postpone the period for ascertaining the wife's next of kin until her death. A class described in a will as "my next of kin under the Statute of Distribution," is one which, according to the Statute, must be ascertained at the death of the testator.

Next of kin at death of testator.

A direction by will that after the decease of the testator's last surviving daughter, and in default of there being any children of such daughter, a fund should be paid "to such persons as will *then* be entitled to receive the same as my next of kin under the Statute," the persons to claim will be those only who can show a title under the Statute, and the only persons who can show such a title are the

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(*e*) These cases had been decided on the supposed authority of *Wilson* v. *Atkinson*, 4 De G., J. & S. 455, but which case *Jessel*, M.R., points out did not lay down a general rule of construction but only one on the particular context.

Ultimate Trusts.

persons who were next of kin at the death of the testator, or the persons who represent them : *Mortimer* v. *Slater*, 7 Ch. D. at p. 327, affirmed sub nom. *Mortimore* v. *Mortimore*, 4 App. Ca. 448 ; and the direction that the fund shall be paid to those *then* entitled is not a direction that the class be then ascertained, but only means that the expiration of the preceding limitations is the time when the persons actually to receive payment are to be found out ; and to do that it must be first ascertained who were the next of kin at the death of the testator : ibid. : and see *Druitt* v. *Seaward*, 31 Ch. D. 234. In that case a testator by will directed that the shares of his daughters in his residuary estate should be settled, with an ultimate limitation, in the event of a daughter not leaving any child or children who shall be living at the decease of the survivor of such daughter and her husband, in trust for such person or persons who under the Statutes of Distributions would on her decease have been entitled thereto in case she having survived her husband had then died possessed thereof intestate ; a daughter died without issue in the lifetime of her husband ; *Pearson*, J., held (disapproving, if not the decision, the reasoning of *Romilly*, M.R., in *Chalmers* v. *North*, 28 Beav. 175), that the daughter's next of kin to take under the ultimate limitation were to be ascertained at the time of such daughter's death, and not that of her husband. See also *Re Bradley*, *Brown* v. *Cottrell*, 58 L. T. 631.

7. Covenants to Settle after-acquired Property, &c.

Covenants to Settle Future Property of Husband.] —Covenants by intending husbands to settle their after-acquired property rarely occur in settlements, and their insertion is not to be recommended. Indeed it is doubtful whether a Court of equity would enforce against a man specific performance of his covenant to settle all his property as being a covenant to dispose of all his means of livelihood ; but if the covenant is to settle his property derived from a specified source, it will be enforceable against him : " Where the covenant is divisible, and the

Covenants to Settle after-acquired Property.

property in question can be brought within any particular class mentioned in the covenant, the covenant may be enforced as to that property, although it may not have been in existence at the time of making the covenant, and although it may not be assignable at law": per *Cotton*, L. J., in *Re Turcan*, 40 Ch. D. at p. 9; see also *Re Clarke*, 36 Ch. D. 348; *Official Receiver* v. *Tailby*, 13 App. Ca. 523.

Such covenants extend to capital only.

On the principle that it is contrary to public policy to deprive a man of his means of livelihood, it has been held that a covenant by a man to settle all his future property extends only to capital and not to income: *Lewis* v. *Madocks*, 17 Ves. 48; *Fyfe* v. *Arbuthnot*, 1 De G. & J. 406; and, similarly, the covenant will not extend to life estates: *St. Aubyn* v. *Humphreys*, 22 Beav. 175.

Avoidance of covenant on bankruptcy.

By sect. 47 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), a covenant in consideration of marriage for the future settlement on the settlor's wife or children of property wherein he had no interest at the date of the marriage, and not being property of his wife, or in her right, is, on his becoming bankrupt before the property is actually transferred pursuant to the covenant, void against his trustee in bankruptcy. The corresponding provisions of the Act of 1869 (32 & 33 Vict. c. 71) sects. 91, 125 (5), only applied to traders: see *Ex parte Bolland, Re Clint*, L. R. 17 Eq. 115.

Advisability of inserting the covenants.

Covenants to Settle Future Property of Wife.]—Marriage settlements prior to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), frequently contained a covenant or agreement to settle the after-acquired property of the wife. Now that by that Act (under sect. 2) all property of whatever nature of a woman married subsequently to the Act, and (under sect. 5) of a woman married before, her title to which accrued after the Act (as to which see *Reid* v. *Reid*, 31 Ch. D. 402) is capable of being acquired, held, and disposed of by her as a *feme sole* without the intervention of a trustee, one of the reasons for the introduction of this covenant,

Covenants to Settle after-acquired Property.

namely, the desire of preventing the husband from acquiring by reason of his marriage possession of property belonging to his wife at the date of the marriage, or coming to her during the intended coverture, has been removed.

Apparent limit to operation of Married Women's Property Act.

But for the same reasons that make it advisable that the restraint on anticipation should notwithstanding the Act be introduced, and even in places where before the Act it was not used (vide, *ante*, p. 295), it will still be advisable as a general rule to introduce this provision. And although all property of a married woman is capable of being acquired, held, and disposed of by her as if she were a *feme sole* without the intervention of a trustee, the Act does not any further affect the rights of the husband, and consequently in default of this covenant any personal property of the wife which she might not have disposed of would be taken by the husband to the exclusion of her next of kin : *Re Lambert, Stanton* v. *Lambert*, 39 Ch. D. 626.

Recital of intent to covenant for settlement of after-acquired property.

It is a frequent and convenient practice, where a settlement contains a covenant to settle after-acquired property, to insert a recital of the agreement of the parties that the deed should contain such a covenant. Great care, however, is needed in framing the recital so as to avoid the risk of a discrepancy between it and the covenant. In considering the effect of the recital upon the clause two points must be borne in mind, (1) That a recital cannot control the operative part where the operative part is clear and unambiguous ; and (2) that the recital of an agreement does not create a covenant where an express covenant is to be found in the operative part relating to the same subject-matter : *Dawes* v. *Tredwell*, 18 Ch. D. at p. 358.

Operative part clear.

Where, therefore, in the operative part there is a clear covenant by the husband alone to settle, then, notwithstanding that the deed contains a recital of an agreement by the parties to settle, and the covenant is introduced by the words, " In pursuance and performance of the said agreement it is hereby agreed and declared," the covenant will be held binding on the husband alone, and the wife will not

Covenants to Settle after-acquired Property.

be bound: *Dawes* v. *Tredwell, supra.* For the converse case, where the operative part being held by *Kay,* J., to be ambiguous, the recital was looked at, and the wife was held to be bound: see *Re De Ros' Trust; Hardwicke* v. *Wilmot,* 31 Ch. D. 81.

State of law on subject before Act.

Nature and Extent of the Covenant.]—The law on the subject of covenants to settle after-acquired property is in a very embarrassing state, and all of the decisions cannot be reconciled: see *Re Clinton's Trusts,* L. R. 13 Eq. at p. 304.

What property to be settled—who to be bound.

The main difficulties that have arisen have been, (1) the ascertainment of the *property* intended to be comprised in the covenant to settle, and (2) the ascertainment of the *person* intending to be bound. These difficulties in some cases have run into one another, for the question, what is to be settled, must often, to a certain extent, depend upon the other question, who has intended to settle property.

Construction of covenant.

The construction of the covenant in each case must depend upon the words used; it is a question of intention to be collected from the terms of the settlement, and from the extrinsic facts and circumstances which may legitimately be taken into account: *Williams* v. *Mercier,* 10 App. Ca. at p. 7. Thus it may be that a particular property might fall literally within the general description of the property to be settled, but the further question whether that property is to be embraced within the covenant must depend upon what has been agreed to be done, and by whom that thing is to be done: per *Kindersley,* V.-C., in *Ramsden* v. *Smith,* 2 Drew. at p. 307.

Covenant by husband alone to settle wife's separate property is nugatory.

Where the question has been, as in many cases, whether separate property of the wife is intended to be settled, there the preliminary question has to be decided whether the wife has intended to covenant, and is bound thereby. For the covenant of the husband can have no effect upon the separate property of his wife, as he cannot dispose of it himself or compel her to dispose of it. Thus, where there has been merely a covenant by the husband that he would settle, or join or concur with his wife in settling, there the covenant being by the husband

Covenants to Settle after-acquired Property.

alone, and only a contract that he would do certain things, the wife was held not bound by the covenant: *Douglas* v. *Congreve*, 1 Keen, 410; *Thornton* v. *Bright*, 2 My. & Cr. 254. And as regards settlements made since 1882, if she is not bound, the covenant will of course be nugatory.

"It is hereby agreed and declared."

The formula "It is hereby agreed and declared" either alone or with the addition of the words "between and by all the parties hereto" (*f*), is often used to effectuate the concurrence of the husband and wife in the covenant to secure after-acquired property. These words, generally speaking, constitute a covenant by all parties to a deed: *Master* v. *De Croismar*, 11 Beav. 184; *Butcher* v. *Butcher*, 14 Beav. 222; *Townshend* v. *Harrowby*, 4 Jur. (N. S.) 353; *Willoughby* v. *Middleton*, 2 J. & H. at p. 354. But where this formula is used in covenants of this or of a similar nature, it is obvious that all the parties to the settlement are not intended to be bound as covenantors, and therefore, if the agreement and declaration goes on to provide that some one or more persons is or are to settle property, or to do or abstain from some act, the words will be construed as importing a covenant on the part only of such named person or persons: *Young* v. *Smith*, L. R. 1 Eq. 180; *Re D'Estampes*, 51 L. T. 503; 22 W. R. 978. In other words, an agreement and declaration by and between all the parties that A. shall do an act, or make a payment or settlement, is (assuming that A. is a party to the deed) a covenant by A. with the other parties, and not a covenant by all. *A fortiori*, if the words "It is hereby agreed and declared" are followed by an express covenant by the husband alone with the trustees that he will do all necessary acts to settle the property, he is the only person bound as covenantor, although the wife is a party to the deed: *Ramsden* v. *Smith*, 2 Drew. 298; *Young* v. *Smith*, L. R. 1 Eq. 180; *Dawes* v. *Tredwell*, 18 Ch. D. 354. It seems preferable that the words of agreement and

(*f*) The addition or omission of the latter words is immaterial: per *Kindersley*, V.-C., in *Ramsden* v. *Smith*, 2 Drew. at p. 309.

declaration should be accompanied by express covenants by both spouses, or such one of them as it is intended to bind, with the trustees; and this course is adopted in the following Precedents.

Covenants to Settle after-acquired Property.

The covenant of the husband alone would be treated as including all such property as he could deal with; *i.e.*, he would be bound (in cases not within the Married Women's Property Act, 1882), to settle any property which would vest in him by law, or of which he would have the power of disposition by law, *e.g.*, the wife's leaseholds; and as regards her real estate although it vested in her, all the interest he took in it, viz., the right to receive the rents and profits during his life and any interest by the curtesy, he would be bound to convey, and also to join with her in conveying the whole property if she was willing to do so. But having no power to deal in any way with her separate property, that property would be unaffected by such a covenant.

Covenant by husband would include all property of wife vesting in him.

If the settlement contains the words "It is hereby agreed and declared," and if the covenant though in form only that of the husband is not that *he* will do all necessary acts, &c., to settle, but that the property shall be settled by all proper parties, or that he and his wife will respectively assure, &c. (*Butcher* v. *Butcher*, 14 Beav. 222; *Hardwicke* v. *Wilmot*, 31 Ch. D. 81), then the wife, if she be a party to and executes the deed, being the person capable of dealing with her separate estate, would be bound to bring it into settlement: *Ramsden* v. *Smith*, at p. 309; *Campbell* v. *Bainbridge*, L. R. 6 Eq. 269; *Re D'Estampes*, 51 L. T. 503; 32 W. R. 978.

Covenant not confined to acts of husband.

In the case of *Hardwicke* v. *Wilmot*, 31 Ch. D. 81, *Kay*, J., also relied on the declaration of trust contained in the covenant, (*i.e.*, that until such settlement of the after-acquired property as had been agreed to be made should be made, the husband and wife, and all other persons in whom such property should be vested, should hold the same upon the trusts declared thereof) as making the wife a trustee of this property until the settlement was made. But in the later case of *Re Anstis, Chetwynd* v.

Declaration of trust with settlement.

Covenants to Settle after-acquired Property.

Morgan, 31 Ch. D. at p. 606, *Lindley*, L.J., treats this declaration of trust as merely a part of the ordinary covenant, and as having no independent operation, and it would appear as if the presence or absence of such declaration were immaterial.

Covenant of wife will bind her notwithstanding contrary direction of donor.

When the wife is bound by the covenant, either expressed or implied, she will be bound to settle all such property as falls within the description of the property so covenanted to be settled; and an express declaration by the donor of any property to her, that such property is not to be settled, cannot take the gift out of the covenant, where but for that expression of intention it would have fallen within it: *Re Allnutt*, 22 Ch. D. 275; *Scholfield* v. *Spooner*, 26 Ch. D. 94.

Secus, where "gift does not fit covenant."

But where the donor has annexed conditions or limitations to the gift, which are inconsistent with the limitations of the covenant to settle, "so that the gift does not fit the covenant," the covenant will not apply: *ibid.*, explaining *Re Mainwaring's Settlement*, L. R. 2 Eq. 487. Thus, if a restraint upon anticipation be annexed to the gift, the wife cannot be required to settle it: *Re Vardon's Trusts*, 31 Ch. D. 275; *Re Currey, Gibson* v. *Way*, 32 Ch. D. 361. Nor will a covenant to settle all real and personal property of or to which the wife might become seized, or possessed, or entitled, during the coverture, for any estate or interest whatever in possession, reversion, remainder, or expectancy, extend to an estate tail devised to the married woman, and which fell into possession during the coverture; she could not be compelled to execute a disentailing deed so as to give herself a fee simple, and to convey to trustees an estate which she did not take; nor was she bound to split up the estate, into the estate for life and a remainder, so as to enable her to convey the life estate, for the interest of the tenant in tail being one and indivisible, if the covenant did not extend to the whole it could not extend to an inseparable part of it: *Hilbers* v. *Parkinson*, 25 Ch. D. 200. But in *Re Anstis, Chetwynd* v. *Morgan*, 31 Ch. D. 596, where the covenant of the wife extended to property over which she should

Covenants to Settle after-acquired Property.

or might have an absolute power of appointment, *Lindley*, L.J., distinguishing the case from *Hilbers* v. *Parkinson*, held that, under a devise of property to her for life, with a restraint upon anticipation, but with a general power of appointment after her death without such restraint, the general reversionary power could be distinguished from the life estate, and that the property subject to the power fell within the covenant. Unless, however, the covenant expressly extends to property over which the wife has a power of appointment, she will not be held bound to appoint it, and make it her own so as to bring it within the purview of the covenant: see *Ewart* v. *Ewart*, 11 Hare, 276; *Bower* v. *Smith*, L. R. 11 Eq. 279.

Election.

Where by reason of the nature of the after-acquired property, the married woman is unable to perform her covenant to settle, no question of election arises (*g*).

Covenant not enforceable by volunteer.

A covenant to settle is not enforceable at the instance of a volunteer. The equitable maxim that equity treats as done that which has been agreed to be done, only applies in favour of persons who are parties to the contract, or who are considered as brought within the consideration as children. Therefore, where in the events which happened, the wife, the covenantor, would have become absolutely entitled to property if brought into settlement under the covenant, and would upon that footing have died intestate as to it, the property was held not to be liable at the suit of the lady's heir to be treated as bound by the covenant: *Re Anstis*, *Chetwynd* v. *Morgan*, 31 Ch. D. 596. A covenant to exercise a power is treated as a defective execution of it, which the Court will cure, only in favour of persons who have bargained for the covenant and for whose benefit it has been entered into: *Affleck* v. *Affleck*, 3 Sm. & G. 394.

Property in existence at marriage not

Other questions have arisen as to the nature of the property intended to be comprised. It has

(*g*) For the principle and foundation of the equitable doctrine of election, see note to *Dillon* v. *Parker*, 1 Sw. 394–409.

Covenants to Settle after-acquired Property.

included under words of futurity.

been held that when the words of a covenant are future, *e.g.*, if the wife, or the husband in her right, "shall during the coverture become entitled to," that covenant does not affect property in existence at the time of the covenant: *Re Pedder's Settlement Trusts*, L. R. 10 Eq. 585; *Re Clinton's Trusts*, L. R. 13 Eq. 295. Such a covenant, without more, applies exclusively to interests to which the parties may acquire a title after marriage *distinct* from those vested at the time of marriage; but it is satisfied with some change in the title to property subsequent to marriage, *e.g.*, property reversionary at the date of the marriage, and falling into possession during the coverture, will be held included: *Archer* v. *Kelly*, 1 Dr. & Sm. 300; *Ex parte Blake*, 16 Beav. 463; *Re Clinton's Trusts*, *supra*; see *Re Michell's Trusts*, 9 Ch. D. at p. 11. But in the last named case the Court of Appeal held that the alteration during coverture of an interest, which was contingent and reversionary at the date of the marriage, into a vested but still reversionary interest, which did not fall into possession till after the end of the coverture, was not sufficient to bring the property within such a covenant.

From one source.

The words "at any time or times" are to be taken as including the further words, which are often introduced, "from any one source": *Re Hooper's Trusts*, 13 W. R. 710; *Hood* v. *Franklin*, L. R. 16 Eq. 496. And even if the words "during the intended coverture" are not expressly introduced into the covenant, the covenant must, in the absence of any expression to the contrary, be read as if those words were inserted. A contrary construction might have the effect of preventing a widow making any settlement on the children of a subsequent marriage. A lady might soon become a widow, and then all her fortune might go under the trusts of the settlement on her former marriage to the entire exclusion of possibly numerous children by a subsequent marriage: *Dickinson* v. *Dillwyn*, L. R. 8 Eq. 546; *Carter* v. *Carter*, *ibid.* 551; *Re Edwards*, L. R. 9 Ch. 97; nor does the fact that the covenant relates only to property from a specified

source make any difference: *Re Campbell's Policies*, 6 Ch. D. 686.

Covenants to Settle after-acquired Property.

Such a covenant will, as against a husband surviving, include property to which the wife became entitled in reversion during the coverture, but which did not fall into possession till after her death: *Hughes* v. *Young*, 9 Jur. (N. S.) 376; and also as against the wife surviving, similar property not falling into possession till after the death of the husband, provided the wife was bound by the covenant: *Butcher* v. *Butcher*, 14 Beav. 222.

Property of wife not falling into possession till after her death.

Whether a husband could be said to acquire "in right of his wife during the intended coverture" property in which the wife had at the date of the marriage a vested reversionary interest, but which did not fall into possession until after her death, would seem to be doubtful. In *Re Jones' Will*, 2 Ch. D. 362, *Jessel*, M. R., held under such circumstances that the husband could not be said to become entitled during the coverture, for that his title did not accrue until he took out administration to his deceased wife's estate, the "inchoate title he had during the coverture depending on the possibility of the property falling into possession during the coverture, amounting to no title at all." His lordship distinctly differed from an earlier decision of *Bacon*, V.-C., in *Re Viant's Trusts*, L. R. 18 Eq. 436, to the effect that a husband, on the moment of the completion of the marriage ceremony, became entitled, within the meaning of such a covenant, to that which was his wife's before, and that the covenant accordingly bound property in which the wife had a vested interest expectant on her own death, and which consequently could not fall into possession during the coverture. But the construction put by the Vice-Chancellor upon the covenant would appear to be adopted by the House of Lords in the case of *Williams* v. *Mercier*, 10 App. Ca. 1, in which case Lord *Selborne*, C., said that it is not possible to "exclude from the duration of the coverture the first moment of its inception any more than the last moment of its continuance. The moment that the marriage is complete by the performance of that which makes

Vested reversionary interest of wife falling in after her death.

Vested reversionary interest incapable of falling in till after her death.

Commencement of coverture.

Covenants to Settle after-acquired Property.

"the parties husband and wife, that moment the coverture begins; and if at that moment he becomes entitled as her husband in her right, I am unable to say that it is not during the intended coverture in a sense which the words may rightly, grammatically, and reasonably bear (*ibid.* p. 7). And in the same case (p. 10), Lord *Blackburn* says that "the indivisible instant" when the coverture commences may be included under the words "at any time during her now intended coverture."

"Indivisible instant."

In *Robinson* v. *Gundy*, 31 Ch. D. 648 (affirmed on this point, 33 Ch. D. 300), *Kay*, J., relied on the introduction of the word "subsequent," viz., "shall at any time subsequent to the solemnisation of the marriage and during the intended coverture," as used for the purpose of excluding all such other property of the wife as would vest in the husband at the so-called "indivisible instant" of marriage.

Policy of life assurance effected after marriage.

A covenant to settle all property real and personal of or to which A. shall become possessed or entitled by devise, bequest, or purchase, will include policies of assurance effected on the life of A. subsequently to the date of the marriage, inasmuch as a policy is held to be property acquired by purchase: *Re Turcan*, 40 Ch. D. 5.

Effect of judicial separation.

In *Dawes* v. *Creyke*, 30 Ch. D. 500, an ante-nuptial settlement contained a covenant (which was binding on the wife) to settle all property which the wife, or her husband in her right, might become seised or possessed of or entitled to *during the intended coverture*. The wife obtained a decree for judicial separation, and subsequently became entitled to certain sums of stock: *Bacon*, V.-C., held that under sect. 25 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the wife was entitled to the stock absolutely as a feme sole unaffected by the covenant: but as to property acquired before decree, see *Waite* v. *Morland*, 38 Ch. D. 135.

Covenant by wife to settle after-acquired property not within the bankruptcy laws, unless she is in trade.

It has been seen (*ante*, p. 321), that a covenant by a man to settle his after-acquired property will, unless it has fallen into possession before his bankruptcy, be void as against his trustee. By sect. 1 (5) of the Married Women's Property Act, 1882 (46 &

47 Vict. c. 75), a married woman trading separately from her husband is made subject to the bankruptcy laws as if she were a feme sole: see *ante*, p. 135. But a married woman, possessed of separate estate, but not carrying on a trade separately from her husband, cannot be made a bankrupt: *Re Gardiner, Ex parte Coulson*, 20 Q. B. D. 249. Consequently a covenant by an intending wife to settle her after-acquired property is not, unless she is engaged in trade, liable to be avoided under the bankruptcy laws.

Covenants to Settle after-acquired Property.

Form of the Covenant.]—A covenant to settle after-acquired property should be so framed as to show whether property in which the wife at the time of marriage had any interest, was intended to be comprised. If so intended, the words "now is," or "at the time," or "at the solemnisation of the marriage," or words of similar import should be introduced. The object of the introduction of such words is to sweep in any interest that may have been omitted either through ignorance or by mistake; and a covenant so framed would include a reversionary interest vested in the wife at the marriage, but liable to be diverted by the exercise of a power of appointment: *Re Jackson's Will*, 13 Ch. D. 189; a share in a sum of stock reversionary at the marriage, and which fell into possession during the coverture: *Re Mackenzie's Settlement*, L. R. 2 Ch. 345; a reversionary interest vested at the time of marriage, and which fell into possession after the death of both husband and wife: *Re D'Estampes' Settlement*, 51 L. T. 503; 32 W. R. 978; and a contingent reversionary interest which was so limited as to be unable to fall into possession during the coverture: see *Cornmell* v. *Keith*, 3 Ch. D. at p. 773, where *Hall*, V.-C., said that these covenants should not have a narrow construction placed upon them.

Introduction of words to show intention to sweep in every interest.

There may be a context or words which will negative the notion of an intention to include a reversionary interest, *e.g.*, a bare direction to sell forthwith or to pay; but where such a direction is accompanied with words which show that the parties had in contemplation property that could not con-

Words negativing intention to include reversionary interest.

Covenants to Settle after-acquired Property.

veniently be dealt with at once, *e.g.*, a direction to sell "when circumstances will permit," which would be construed as "reasonably permit," the direction to sell would not be treated as excluding such an interest: *Re Jackson's Will*, at p. 198; and see *Sweetapple* v. *Horlock*, 11 Ch. D. 745.

Lapse.

Property preserved to a legatee from lapse by sect. 33 of the Wills Act does not fall within a covenant to settle property coming to or vesting in such legatee during coverture: *Pearce* v. *Graham*, 9 Jur. (N. S.) 568; 11 W. R. 415.

Limit of value.

Restrictions and Exceptions.]—The covenant usually fixes some limit of value, under which property will not be included. The property to be included being as before mentioned, property coming from one and the same source, for the purpose of estimating the value it is immaterial that sums may be coming at the same time from divers sources, which would in the aggregate equal or exceed the fixed limit.

Value of property, and not of interest of settlor in it.

It is the value of the property and not of the interest of the settlor in the property that is to be estimated. Thus, if at the time of the settlement the interest of the lady is reversionary, and the value of the property as such would be less than the limit; still if the selling value of the property is when it falls in, of, or over the fixed limit, the interest in it will have to be brought into scttlement: *Re Mackenzie's Settlement*, L. R. 2 Ch. 345; *Cornmell* v. *Keith*, 3 Ch. D. 767, 771. In the case of *Bower* v. *Smith*, L. R. 11 Eq. 279, the limit fixed was 500*l.* A sum of 5,499*l.* 19*s.* 1*d.* was bequeathed to such trusts as a lady, who had entered into the covenant, should appoint; she desiring to withdraw this money from her settlement, executed eleven successive deeds of appointment, many of them on the same day, and by each appointed in her own favour the sum of 499*l.* 19*s.* 11*d.*, and it was held that she was not bound to bring the money into settlement. See also *Re Lord Gerard*, W. N. 1888, p. 35.

Settlor may not reduce the value of the property below the limit.

But a person will not be allowed to covenant to settle property of a certain value, and afterwards by his own act reduce a fund, to which the covenant

would have applied, below the value, *e.g.*, if after entering into such a covenant he received by way of advancement portions of a fund, which fund would if of sufficient value fall within the covenant, and the effect of the advances is to reduce the fund below the limit, the advances received will have to be taken into account in estimating the value of the fund: *Hood* v. *Franklin*, L. R. 16 Eq. 496.

Covenants to Settle after-acquired Property.

The covenant also generally excepts certain property, *e.g.*, trinkets (*h*), jewelry, and articles of a similar nature, which it provides shall belong to the wife absolutely; and annuities and other life interests of the wife (see *Scholfield* v. *Spooner*, 26 Ch. D. 94), which it provides are to be held upon the original trusts. It will generally be useful to annex a restraint on anticipation to life interests and annuities, so as to meet the case of the annuities and interests not being so limited, and consequently disposable of by the wife during coverture.

Exception from covenant.

Where the exception from a covenant by husband and wife was of property which should be "previously otherwise settled," the covenant was held not to comprise a fund coming to the wife under a bequest made to her during the coverture for her sole and separate use, and free from the debts, control, and engagements of the husband: *Kane* v. *Kane*, 16 Ch. D. 207. But where, in a settlement made in 1862, any property "settled to B.'s separate use" was excepted, and a residuary bequest was made to B. under the will of C., who died after the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), came into operation, *Pearson*, J., held, that as sect. 19 of that Act saved existing settlements, and the right to make settlements in future, sect. 5 of the Act must not be looked at, and consequently the residuary bequest did not fall within the exception: *Re Stonor's Trusts*, 24 Ch. D. 195; and the Court of Appeal have since given a similar decision in *Christian* v. *Whitaker*, *Re Whitaker*, 34 Ch. D. 227; see also *Hancock* v. *Hancock*, 38 Ch. D. 78.

Property previously otherwise settled and property "settled to her separate use."

The effect of these decisions appears to be that

(*h*) The word "trinkets" does not appear to have received any judicial interpretation.

Covenants to Settle after-acquired Property.

the rights of persons interested under settlements are not to be disappointed by the Act, and that consequently where the effect of the Act would be to withdraw from the settlement property which, apart from the Act, would have fallen within and been bound by the provisions of the settlement, the Act is, for the purposes of the settlement, to be treated as non-existing.

The cases above mentioned all fall within sect. 5, the marriage settlement having been made before the Act, but it would seem that the decision would be the same had the settlement been made after the Act. If so, an introduction of such an exception may still be effectual.

Provisions for withdrawing part of funds out of settlement.

Power to withdraw Funds from Settlement.]—It is often advisable, especially where husband and wife, or one of them are or is young, and, in the case of the wife, when the settlement includes not only all or the larger part of her present property, but also all after-acquired property, to give to the survivor a power of withdrawing altogether a certain proportion of the funds out of settlement in the event of a second marriage, which can then be dealt with as such survivor may desire, or of appointing in favour of a surviving husband or wife (as the case may be) a life interest either in the whole or in a part of the funds in settlement, and a certain proportion of the capital among their children, or issue of their subsequent marriage, as well as among those of the marriage then in contemplation.

Amount.

The amount so to be withdrawn, or applied in favour of the second husband or wife and children, or issue, is often made to depend upon the number of children of the then intended marriage attaining a vested interest. But this is of course a matter of detail to be arranged between the parties, and no definite rule can be laid down on the subject.

8. Trustee Clauses.

Statutory provisions relating to trustees.

"Trustee clauses," namely, a trustees' receipt clause, a power to appoint new trustees, and clauses providing for the indemnity and reimbursement of

Trustee Clauses.

trustees, were formerly inserted as a matter of course in settlements, but the necessity for their insertion has, as a general rule, been superseded by statutory enactments, which will be now briefly considered. The following precedents will contain forms of express clauses relating to the powers and liabilities of trustees, which may be found useful under special circumstances, in which the statutory provisions appear to admit conveniently of addition or modification.

Trustees' Receipts.]—By sect. 36 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted as follows :—

Trustees receipts.

"(1.) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects, payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

"(2.) This section applies to trusts created either before or after the commencement of this Act."

Effect of this enactment.

This section replaces the repealed sect. 29 of Lord Cranworth's Act, which applied only to money payable under trusts or powers; the present enactment has a more enlarged operation, as it extends also to securities and other personal property and effects.

The use of the expression "trustees or trustee" is only intended to meet the case of there being only one trustee in existence at the time of the payment, transfer, or delivery, and does not render it safe for a purchaser paying money, or a person transferring, or delivering property to trustees, to accept the receipt of one only of several trustees, at all events unless it can be shown that the other trustees authorised their co-trustee to receive the money or property: *Lee* v. *Sankey*, L. R. 15 Eq. 204; see Sudg. V. & P. 667; Dart, V. & P. 602. Trustees cannot authorise one of their number to receive and give effectual receipts for money or property payable,

Trustee Clauses.

transferable, or deliverable to them all: *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592 (*i*).

Reversionary property.

As to the power of trustees, with the concurrence of a tenant for life, to give receipts for property to which they are entitled in reversion expectant on the determination of the life interest, see *Anson* v. *Potter*, 13 Ch. D. 141.

Sale by trustees under the Lands Clauses Act.

Where trustees for sale, having no express power to give receipts, sold land to a railway company under the Lands Clauses Act, 1845, and the purchase money was paid into Court, it was held that the statutory power to give receipts applied, and the money was ordered to be paid out to them without serving the *cestuis que trust*: *Re Thomas' Settlement*, W. N. 1882, p. 7.

Payment to solicitor of trustees.

By sect. 56 of the Conveyancing and Law of Property Act, 1881, the production by a solicitor of a receipt in a deed, or indorsed thereon, signed by the person entitled to give the receipt, is a sufficient authority to a person liable to pay or give any money or other consideration, to pay or give the same to the solicitor (*j*). But till recently this enactment did not authorise trustees, in the absence of an express power, to receive money through their solicitor: *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; see *Speight* v. *Gaunt*, 9 App. Ca. 1.

But this restriction has been to some extent removed for the future by sect. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), which enacts as follows:—

(*i*) The contrary was decided in *Brice* v. *Stokes*, 11 Ves. 319, and this decision was supported by a dictum of Sir W. P. Wood, V.-C., in *Webb* v. *Ledsam*, 1 K. & J. 385; but this view did not meet with the approval of conveyancers and must be regarded as overruled by the decisions of the Court of Appeal and of *Kay*, J., respectively, cited in the text.

(*j*) The solicitor producing the deed must, in order to discharge the person paying the money, be a solicitor acting for the party to whom the money is to be paid, and the deed must be actually produced at the time of payment: *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491.

Trustee Clauses.

Receipt of money by solicitor as agent.

"2.—(1.) It shall be lawful for a trustee (*k*) to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the fifty-sixth section of the Conveyancing and Law of Property Act, 1881 (*l*); and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said fifty-sixth section, as the same would have had if the person appointing such solicitor had not been a trustee; Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee.

"(2.) It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by such trustee, and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money to remain in the hands or under the control of the banker or solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such banker or solicitor to pay the same to the trustee.

"(3.) This section shall apply only where the money or valuable consideration or property is to be received after the passing of this Act."

Appointment of solicitor as agent for

This section requires some careful consideration.

(*k*) "Trustee" for the purposes of the Act shall be deemed to include an executor or administrator, a constructive or implied, as well as an express trustee, but not the official trustee of charitable funds, s. 1 (3); and the powers of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee (4).

(*l*) *I.e.* a receipt signed by the person entitled to give a receipt.

Trustee Clauses.

receipt of monies payable to trustees, &c.

The effect of sub-sect. (1) seems merely to be to empower trustees to *appoint* a solicitor as their agent to receive and give a receipt for money or other property on their behalf, by *permitting* such solicitor to have custody of and produce a deed containing a proper receipt; and the sub-section goes on in effect to enact that the producing of any such deed by *such* solicitor (*i.e.* a solicitor duly appointed by such permission), shall be a sufficient authority for payment of the money or transfer or delivery of the property to the solicitor. The validity of the authority therefore seems to depend upon the fact whether or not the solicitor producing the deed has the custody of and produces the same, with the *permission* of the trustee or trustees, and it is conceived that a person liable to pay money or to transfer or deliver property to the trustee or trustees would be entitled to require to be satisfied on that point (*m*). The same remarks would equally apply to the production of a policy of assurance by a solicitor or banker under sub-sect. 2.

Receipt to be "contained" in the deed produced.

It is further to be observed that sub-sect. (1) requires the receipt to be *contained* in the deed produced, whereas sect. 56 of the Conveyancing and Law of Property Act, 1881, expressly permits the receipt to be either in the body of the deed, or endorsed thereon. Whether an endorsed receipt is to be deemed to be contained in a deed for the purpose under consideration, is a question which must be left to judicial decision when occasion arises; but meanwhile it will be prudent for solicitors who are acting for trustees, and who are intended to receive money or other property on their behalf, to see that

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Memorandum of delivery of deed to solicitor.

(*m*) It may be well to annex to, or indorse upon the deed intended to be produced, a memorandum to the following effect:

"We, the undersigned, being the trustees of the deed hereunto annexed [*or* the within written deed] hereby declare that the same deed is delivered into the custody of, and will be produced by [*solicitor*], of, &c., as our solicitor with our permission for the purpose of receiving payment of the sum of £—— from [*purchaser*], of, &c., the person liable to pay the same [*or as the case may require*].

[*Signatures of Trustees.*]"

Trustee Clauses.

the deed contains a receipt clause in the operative part, and that it is executed by the trustees.

Whether a solicitor-trustee can give a receipt on behalf of his co-trustees.

It has hitherto been generally considered that one of several trustees cannot be authorised to receive and give an effectual receipt on behalf of his co-trustees: see *ante*, p. 335. Sub-sect. (1) does not contain any express provision for the contingency of the solicitor to the trust being himself, as is not unfrequently the case, one of the trustees, and accordingly leaves it not quite free from doubt whether a solicitor-trustee can properly receive and give a receipt for money or property on behalf of his co-trustees under this enactment. It may be well to give to a solicitor-trustee express authority for these purposes.

Liability of trustees leaving money in hands of solicitor or banker.

Both sub-sects. (1) and (2) contain provisions maintaining in force the former liability of trustees in case they have money or other property in the hands of their solicitor or banker, as the case may be, for an unreasonable time, as to which see *ante*, p. 272. It may perhaps, however, be reasonably presumed that, where a trustee has appointed the bankers of the trust his agents to receive insurance moneys, the placing of the moneys on deposit by his authority at the same bank, until a suitable investment can be found, would be deemed to be a payment by the banker to the trustee within the meaning of the sub-section, so as to exempt the trustee from liability, assuming the deposit to be under the circumstances otherwise reasonable and proper.

Conveyancing, &c., Act, 1881, s. 31.

Appointment of New Trustees.]—Formerly settlements usually contained express powers to appoint new trustees in certain specified eventualities; but the insertion of such powers is now rendered generally unnecessary by virtue of sect. 31 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts as follows:—

Appointment of new trustees, vesting of trust property, &c.

"(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or

Trustee Clauses.

desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

"(2.) On an appointment of a new trustee the number of trustees may be increased.

"(3.) On an appointment of a new trustee it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

"(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof jointly in the persons who are the trustees, shall be executed or done.

"(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

"(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

"(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

"(8.) This section applies to trusts created either before or after the commencement of this Act."

Conveyancing Act, 1882, s. 5.

Concurrently with this section should be read section 5 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which enacts :—

"(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first mentioned part.

"(2.) This section applies to trusts created either before or after the commencement of this Act" (1 Jan. 1883).

Trustee Clauses.

Appointment of separate set of trustees.

The effect of the enactments above set out is to render it generally unnecessary to make provision in settlements for the appointment of new trustees, otherwise than by nominating such person or persons as may be desired for the purpose of exercising the statutory power of making such appointment. In the absence of such nomination the surviving or continuing trustees for the time being, or the personal representatives of the last surviving or continuing trustee, are the persons to exercise the power. In a marriage settlement, the persons nominated for this purpose will generally be the husband and wife jointly during their joint lives, and the survivor of them during his or her life, the power being left after the death of the survivor to be exercised by the persons indicated by the statute. Sometimes, however each party names one or more trustees, and it is desired that the power of appointing new trustees should be reserved to the party who originally appointed the trustee by whose death, retirement, absence abroad, unfitness or incapacity the vacancy is caused; this may be conveniently effected by a clause supplementary to the statutory power. In the case of settlements which are the result of mutual negotiation, it will seldom be necessary to insert any words providing for the refusal or neglect of the primary donees to exercise the power such as are sometimes advisable in wills: see *post*, sub tit. WILLS, Vol. VII., p. 967, note (*d*). See as to who will be deemed to be nominated to appoint new trustees in a settlement made prior to 1882, *Re Walker and Hughes Contract*, 24 Ch. D. 702.

Express powers of appointing new trustees now generally unnecessary.

It is no longer necessary to provide expressly that on an appointment the number of trustees may

Increase or reduction of number on appointment.

Trustee Clauses.

be increased or reduced, as this matter is provided for by sect. 31, (2), (3), of the Act of 1881, *ante*, p. 340.

Retiring trustee, whether a "continuing trustee."

For the purpose of the exercise of the statutory power, a "continuing trustee" includes a refusing or retiring trustee if willing to act: see sect. 31, (6), *ante*, p. 340. But it must be borne in mind that this provision applies only to the statutory power, and does not extend to express powers, and also that sect. 31, applies only so far as a "contrary intention" is not expressed in the settlement, and has effect subject to the terms and provisions of that instrument: see sub-sect. (7), *ante*, p 340. It may now be regarded as settled, notwithstanding the decision of *Bacon*, V.-C. in *Re Glenny and Hartley*, 25 Ch. D. 611, and the opinion of *Lord St. Leonards*, (see Sugd. Pow. 886) to the contrary, that, in the construction of an express power, in the absence of words to the contrary, a trustee who has signified his intention to retire is not "a continuing trustee" so as to render his concurrence necessary in an appointment, or so as to enable him, if a sole trustee, to appoint his successor: *Travis* v. *Illingworth*, 2 Dr. & Sm. 344; *Re Norris*, 27 Ch. D. 333; *Re Coates to Parsons*, 34 Ch. D. 370. If therefore there are only two trustees, either originally appointed or surviving, and one of them dies, and the other wishes to retire, the proper course is for the last surviving trustee by one instrument under seal or not as may be required by the power to appoint a new trustee in the place of the deceased trustee, and for the latter, as continuing trustee, by a separate instrument bearing a subsequent date, to appoint a substitute to the retiring trustee: see *Stones* v. *Rowton*, 17 Beav. 308. By this means all doubts will be obviated as to the validity of the appointments, and, in the case of real estate, as to the effectual transmission of the legal estate by the conveyance or vesting declaration. Although the statutory power is exerciseable when a vacancy occurs in events provided for by the statute, but for which no provision is made by the settlement (see *Cecil* v. *Langdon*, 28 Ch. D. 1), it seems somewhat doubtful whether recourse could be had to the statute, where

Trustee Clauses.

the settlement has expressly provided that a vacancy caused by retirement shall be filled up by a continuing, *i.e.* not a retiring trustee.

Sole trustee.

A sole trustee comes within the expression "the last surviving or continuing trustee," so as to enable his executor to exercise the statutory power of appointing new trustees: *Re Shafto's Trusts*, 29 Ch. D. 247.

The events in which the statutory power of appointment becomes exerciseable correspond with those ordinarily specified in settlements according to the former practice. See for a full consideration of this subject, *ante*, sub tit. "APPOINTMENT OF NEW TRUSTEES," Vol. II., pp. 8, *et seq.* See also Vaizey on Settlements, Vol. II., 1359, *et seq.*

Modification of statutory power of appointing trustees.

It is open to the parties if desired to modify the statutory provisions: see sub-sect. 7. Under the statutory power a new trustee cannot be appointed in the place of one resident abroad, until such residence has continued for twelve calendar months, and it may sometimes be advisable to expressly introduce a more stringent qualification as regards absence. A "contrary intention" is not implied merely because a settlement specifies only some of the events mentioned in the statute, and expresses no intention as to others: and if one of the omitted events should occasion a vacancy, recourse may be had to the statutory power: *Re Coates to Parsons*, 34 Ch. D. 370. In such a case, it would seem that the statutory power is exerciseable not by the person nominated by the settlement, but by the surviving or continuing trustee, &c.: see *Cecil* v. *Langdon*, 28 Ch. D. 1, but the circumstances in that case were of a special character.

Indemnity and Reimbursement of Trustees.]—The right of trustees to indemnity and reimbursement is recognised by sec. 31 of Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35), which enacts that:—

Every trust instrument to be deemed to contain clauses for the

"Every deed, will, or other instrument creating a trust either expressly or by implication shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following:

Trustee Clauses.

indemnity and reimbursement of trustees.

"That the trustees or trustee for the time being of the said deed, will, or other instrument shall be respectively chargeable only for such monies, stocks, funds, and securities as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument to re-imburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

Indemnity clause gives no increased protection.

This enactment does not in fact give any further protection to trustees than they would have had by the general doctrine of Courts of Equity; it is only a recognition of that existing doctrine. Notwithstanding this section, a trustee, although morally innocent of all fraud, may be responsible and held jointly with his fraudulent co-trustee or co-trustees, and severally, liable to replace the fund which his co-trustee may have fraudulently made away with. This subject has already been dealt with in reference to the liability of trustees in the matter of investments and their right to employ agents: see *ante*, p. 271; see also *Speight* v. *Gaunt*, 9 App. Ca. 1; *Fry* v. *Tapson*, 28 Ch. D. 268.

Breach of duty to delegate office to co-trustee unless settlor authorises delegation.

If one trustee leaves to his co-trustee the management of the trust fund, relying upon his greater business capacity, he will be responsible for the acts and defaults of his co-trustee. It is a breach of a trustee's duty to delegate his office to another, consequently if he does, and the property is lost or made away with, he will remain liable. But if the settlor chooses to empower his trustees to delegate their office to one or more of their number, the responsibility of the non-acting trustees will cease: *Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47; see Lewin on Trusts, 6th ed., pp. 222 *et seq.*

Trustee Clauses.

A trustee although, as between himself and his *cestui qui trust*, he is equally liable with the offending trustee, may nevertheless be entitled to an indemnity from the acting trustee under special circumstances, *e.g.* where the acting trustee has been solicitor to the trust, and has personally obtained the benefit resulting from the breach of trust; but there is no such general liability on the part of the acting trustee: *Bahin* v. *Hughes*, 31 Ch. D. 390. Where one trustee acts honestly though erroneously, the other trustee who by doing nothing neglects his duty more than the acting trustee, is not entitled to indemnity: per *Cotton*, L. J., *ibid.* p. 396, and see *Bacon* v. *Camphausen*, 58 L. T. (N. S.) 851.

Innocent trustee may have right of indemnity against acting trustee in special cases.

It was, even previously to the recent Trustee Act, 1888, held by the Courts to be a general principle of law, that a trustee who is induced by a *cestui que trust* to commit a breach of trust, was entitled to be indemnified against its consequences out of, and to the extent of the interest of that *cestui que trust* under the instrument: *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104; and the acquiescence merely of the *cestui que trust*, if a man and of full age and capacity, was sufficient: *Sawyer* v. *Sawyer*, 28 Ch. D. 595: see *Trafford* v. *Boehm*, 3 Atk. 440.

Trustee committing breach of trust at instance of *cestui que trust* entitled to indemnity.

The principle was that the trustees are entitled to stand in the place of those interested under the settlement who have a right to call for the refunding of the property which has been withdrawn from the trust by a breach of trust to which the acquiescing *cestui que trust* are privy. "The substance of the transaction is a charge created by a *cestui que trust* in favour of a trustee by way of indemnity against a breach of trust committed by him," per *Fry*, L. J., in *Sawyer* v. *Sawyer*, 28 Ch. D. at p. 603; and a trustee cannot by contract waive his right to resort to the life interest of a tenant for life for the purpose of replacing a trust fund which in breach of trust he has lent to the tenant for life: *Fuller* v. *Knight*, 6 Beav. 205. But before the Act of 1888 to bind the interest of a married woman who was entitled for her separate use, it was necessary to show that she instigated or was an actor in the breach of trust, and

Charge in favour of trustee by way of indemnity against breach of trust.

In case of married woman before Act of 1888.

Trustee Clauses.

was fully informed of the state of the case. Mere acquiescence in or approbation of the breach of trust after it had been committed was not enough : *Sawyer* v. *Sawyer*, 28 Ch. D. at p. 605 ; referring to *Ryder* v. *Bickerton*, 3 Sw. 80 n. ; 1 Eden, 149 n. ; *Mara* v. *Manning*, 2 J. & Lat. 311, 318 ; *Crosby* v. *Church*, 3 Beav. 485 ; *Clive* v. *Carew*, 1 J. & H. 199; *Pemberton* v. *McGill*, 1 Dr. & Sm. 266. And it is conceived that the Married Women's Property Act, 1882, has made no difference in this respect.

But now sect. 6 of the Trustee Act, 1888, enacts :—

Indemnity for breach of trust.

"(1.) Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

"(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act."

Breach of trust at request of married woman.

The Court has under this section a discretion as to whether it will or not make the order, and, where a breach of trust is alleged to have been committed at the request of a married woman, to induce the Court to make an order under this section, evidence may not improbably be required that she was fully cognisant of the circumstances : see *Sawyer* v. *Sawyer*, 28 Ch. D. 595. Trustees should therefore be careful not to depart from the strict terms of the trust at the request of a married woman, unless they can show that she had independent and competent professional advice, and that she had full knowledge ; and they should require the request to be made to them in writing signed by the married woman herself.

Effect of restraint on anticipation.

Before this Act, when the interest of a married woman was subject to a restraint on anticipation,

Trustee Clauses.

the trustees were held not to be entitled to claim the benefit of any charge upon or right of retainer against that interest: *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532, at all events when the breach of trust has been committed before the receipt by the trustees of the dividends which she was restrained from anticipating.

Liability of trustees to maintain policies.

Where part of the trust property consists of a policy or policies of assurance, questions often arise how and to what extent trustees are liable to maintain them.

If the person who has covenanted to pay the premiums, neglect or refuse to do so, or through poverty be unable to pay them, the trustee will in the former case be bound to sue him on his covenant; in the latter, as an action would be a useless proceeding, the trustee, if he has no funds available, and can procure none, will be exempt from liability if he suffer the policy to be forfeited: *Hobday* v. *Peters*, 28 Beav. 603; *Clack* v. *Holland*, 19 Beav. 262.

When they may allow it to drop.

But trustee who, without any money applicable for the purpose, lends or procures money for premiums will obtain lien.

A trustee however, if he has no funds properly applicable to keeping up the policy, may do, and ought to do, what he can to protect the policy; and if he advance or obtain money for the purpose of paying the premium, he will then obtain a lien on the policy, because having no money applicable for the purpose, he does really what is the best for the *cestui que trust* in obtaining money for that purpose: per *Romilly*, M. R., in *Clack* v. *Holland*, 19 Beav. 276. In *Hill* v. *Trenery*, 23 Beav. 16, the same learned judge allowed the trustees to sell a policy which was settled, there appearing to be no funds available for keeping it up, and to accumulate the balance of the proceeds of sale after repaying to themselves the amount of a former premium paid by them; and in *Beresford* v. *Beresford*, 23 Beav. 292, the same judge allowed a settled policy to be surrendered.

As to advisability of giving to trustees power to sell policies.

When the husband brings a policy on his life into settlement, and the settlement does not afford a means of keeping up the policy (*e.g.*, when the settled property is reversionary), a power should be given to the trustees to sell the policy, either by

Trustee Clauses.

way of surrender to the office or otherwise; and they should be directed to invest and deal with the proceeds in the same way in which the monies secured by the policy are directed to be dealt with, but so that the husband should not be allowed to take any interest in those proceeds, or the monies may be directed to accumulate during the life of the husband (*n*), or for any other period authorised by the Thellusson Act, and on the termination of such period the accumulated fund will be held upon the trusts of the monies secured by the policy.

Payment of premiums by stranger.

A stranger voluntarily paying a premium on a policy to preserve it from dropping, does not thereby gain any lien or charge upon the policy: *Burridge* v. *Row*, 1 Y. & C. Ch. 183, 191. A lien will be created by payment of premiums only in the four following cases:—"(1) By contract with a beneficial owner of the property. (2) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation. (3) By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property. (4) By reason of the right vested in mortgagees or other persons having a charge upon the policy to add to their charge any monies which have been paid by them to preserve the property": see *per Fry*, J., in *Leslie* v. *French*, *Re Leslie*, 23 Ch. D. at p. 560, where he gives as illustrations, of class (1); *Aylwin* v. *Witty*, 30 L. J. Ch. 860, and of classes (2) and (3); *Clack* v. *Holland*, 19 Beav. 262; *Gill* v. *Downing*, L. R. 17 Eq. 316; *Todd* v. *Moorhouse*, L. R. 19 Eq. 69.

The above four classes must be taken to exhaust all the cases where a person not the beneficial owner of a policy paying the premiums will be entitled to a lien on the proceeds of the policy: *per North*, J., in *Re Earl of Winchelsea's Policy Trusts*, 39 Ch. D. at p. 173.

(*n*) If he be the settlor of the policy, it will be excepted from the operation of the Act, see the Thellusson Act (40 Geo. 3, c. 98), sect. 2; and see *post*, sub tit. "WILLS," Vol. VII., pp. 448, 457.

Trustee Clauses.

In the same case the Judge points out that the trustee's right to indemnity is confined to the trust fund, and unless the policy monies are *trust* monies the trustee has no right to them.

Right to indemnity confined to trust fund.

The claim of a stranger making a voluntary payment of premiums has been often based on the attempted analogy of the principle of salvage—that where one person has at his own cost preserved property belonging to another, it is inequitable for that other to take the benefit of his expenditure without paying for it. But the analogy cannot be supported, and the only principle on which any claim for repayment for labour or money expended by one person upon the property of another with a view to saving that property or benefiting the owner can be based, is when, from the circumstances of the case, the proper inference to be deduced is that there was that which amounted to a request on the part of the owner to perform the particular service: *Falcke* v. *Scottish Imperial Insurance Society*, 34 Ch. D. at p. 249.

Advances by tenant for life to pay charges upon *corpus*.

In *Todd* v. *Moorhouse*, 19 Eq. 69, a tenant for life, who, at the request of the trustees, advanced money to pay the calls upon shares forming part of the trust estate, and which were properly payable out of *corpus*, was held entitled to a lien on the shares for the advance and interest, even although the trustee might have procured the money elsewhere. But if the trustee, by duly performing his trust, ought to be in possession of funds applicable to the payment of the premiums, or if he has obtained money from the *cestui que trust*, he acquires no lien on the policy, and consequently cannot confer a lien on another: per *Romilly*, M.R., in *Clack* v. *Holland*, 19 Beav. 276. And see, on the question of subrogation of a stranger to a right of a trustee, *Strickland* v. *Symons*, 22 Ch. D. 666; 28 Ch. D. 245; where a trustee, without any authority under the will, carried on an asylum for the benefit of the trust estate and incurred debts, the creditor was held to have no claim upon the trust estate.

Duty of trustees of leaseholds.

When leaseholds are vested in trustees (unless

Trustee Clauses.

the settlement is by way of demise, see *ante*, p. 236), they are liable upon the covenants in the lease, and it is their duty to see that the property is protected against forfeiture; and in the absence of any express direction the costs of so doing are payable out of the *corpus*. In the case of *Re Fowler, Fowler* v. *Odell*, 16 Ch. D. 723, *Fry*, J., held that where the only funds available for repairing leasehold houses vested in trustees upon trust for tenant for life and remaindermen were the rents and profits of the houses, those rents ought to be so applied, and inasmuch as the tenant for life who had been permitted to receive the rents neglected to keep the property in repair, at the instance of the trustees he appointed a receiver of the rents. He further held that they were not bound to rest satisfied with the setting apart of a sum of money in the joint names of themselves and tenant for life as an indemnity against the consequences of a breach of the covenants, but had a right to require the covenants to be specifically performed (*o*).

Reimbursement of trustees.

It is part of the contract of trusteeship that trustees shall be reimbursed all the costs, charges, and expenses properly incurred by them in the execution of the trusts: *How* v. *Godfrey*, Rep. t. Finch, 361; *Hide* v. *Haywood*, 2 Atk. 126; *Caffrey* v. *Darby*, 6 Ves. 497; *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & F. 512; and they can be deprived of them only on the ground of misconduct: *Turner* v. *Hancock*, 20 Ch. D. 303; and this right to indemnity and reimbursement "is a first charge on all the trust property both income and *corpus*": per Lord *Selborne*, C., in *Stott* v. *Milne*, 25 Ch. D. at p. 715; and even though the settlement, originally valid, has been subsequently avoided by the bankruptcy of the settlor under the Bankruptcy Act, 1883, s. 47: *Ex parte Official Receiver, Re Holden*, 20 Q. B. D. 43. Nor will a trustee be deprived of costs by reason

(*o*) This case has been explained in *Coles* v. *Courtier*, 34 Ch. D. 136, where *Fry*, L.J., disclaimed having in any way intended to decide any question as to the rights, *inter se*, of tenant for life and remainderman.

Trustee Clauses.

merely of his having invested in what is not strictly speaking an authorised security, if at the time of the judgment the fund has been replaced without loss: *Peacock* v. *Colling*, 54 L. J. Rep. (Ch.) 743. The rule extends to the allowance to trustees of their costs properly incurred in bringing or defending legal proceedings for the purpose of protecting the trust estate: *Amand* v. *Bradburne*, 2 Ch. Ca. 138; *Ramsden* v. *Langley*, 2 Vern. 536; *Lovel* v. *Fraser*, L. R. 1 H. L. Sc. 37; or of opposing a bill in Parliament which affects the trust estate: *Re Nicoll's Estates*, W. N. 1878, p. 154.

Trustee must not incur unnecessary expense.

A trustee is not, however, at liberty to incur expense without good cause, or to institute unnecessary legal proceedings; and he should be careful to act on counsel's advice in instituting any such proceedings: *Stott* v. *Milne*, *supra*, p. 714; and a trustee whose improper conduct or negligence has rendered legal proceedings necessary, or who has improperly instituted proceedings, will not be entitled to reimbursement out of the trust fund: *Brown* v. *Burdett*, 40 Ch. D. 244. The Court is at liberty to disallow trustees' and executors' costs improperly incurred by them: *Johnson* v. *Telford*, 3 Russ. 477; *Re Brown*, L. R. 4 Eq. 464; *Allen* v. *Jarvis*, L. R. 4 Ch. 616; see Lewin on Trusts, 8th ed. p. 636.

In *Brown* v. *Burdett* (*supra*, at p. 260), *Kay*, J., laid down two rules which were approved and adopted by the Court of Appeal. (1.) The Court will not permit the costs occasioned by improper litigation or by the negligent conduct of administration proceedings to be paid out of an estate under its care.

Costs of improper litigation.

(2) The amount of costs allowed by a taxing-master as between the client and his solicitor is not conclusive of the amount which the Court will allow out of the estate.

Costs taxed and allowed as between solicitor and client not necessarily payable out of estate.

Nor is a trustee allowed to charge for his personal trouble or loss of time, in accordance with the rule that a trustee shall make no profit out of the trust estate, or, as more accurately stated, "that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that

Trustee may not charge for personal trouble or loss of time.

Trustee Clauses.

duty": *Broughton* v. *Broughton*, 5 De G. M. & G. at p. 164; see *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; *Bennett* v. *The Gas Light and Coke Company*, 52 L. J. Rep. Ch. 98. And where a trustee by so doing acquires benefit, that benefit will be transferred to the trust estate: *Bennett* v. *The Gas Light and Coke Company, supra.*

Trustee personally doing work which he might employ agent to do.

Although a trustee not being required to have special knowledge may employ on proper occasions certain agents upon proper terms, *e.g.* a solicitor to perform legal business, a receiver to collect the rents of a number of small properties, or a stock-broker to invest trust monies, still, if the trustee being competent to do the work, choose to do it himself, he cannot charge the estate with any costs for so doing.

Solicitor-trustee.

A trustee, therefore, who is a solicitor cannot in the absence of an express direction charge the trust estate for business done out of Court with anything but his out-of-pocket costs: *Moore* v. *Frowd*, 3 My. & Cr. 45; *New* v. *Jones*, 1 Mac. & G. 668, n.; *Broughton* v. *Broughton, supra.* And the same rule applies where he is a member of a firm and the firm act for the trust, in which case the firm will not be allowed profit costs out of the estate.

Rule in *Cradock* v. *Piper.*

The same rule applies where the solicitor trustee does business in Court acting *for himself alone*, whether plaintiff or defendant. But an exception to the general rule has been laid down by Lord *Cottenham* in *Cradock* v. *Piper*, 1 Mac. & G. 664, according to which a solicitor-trustee is entitled to charge profit costs against the trust estate when he has acted as solicitor in an action or other proceeding in Court not only for himself but *also for a co-trustee* appearing jointly for himself and his co-trustee, subject to the proviso that the costs have not been increased by his appearing for himself as well as his co-trustee. This decision has been commented upon in various subsequent cases (*Broughton* v. *Broughton, supra; Manson* v. *Baillie*, 2 Macq. 80), but has not been overruled: *Re Barber, Burgess* v. *Vinicome*, 34 Ch. D. 77; *Re Corsellis, Lawton* v. *Elwes*, 34 Ch. D. 675. And the rule, although it may be con-

Trustee Clauses.

sidered anomalous, has now become an established rule of practice (*p*).

Proceedings.

The proceedings in Court need not be hostile proceedings. The costs of a summons to obtain the direction of the Court as to the maintenance of an infant, taken out in the matter of the infant (and not in an action), were held by the Court of Appeal (reversing the ruling of *Kay*, J., on this point) to fall within the exception laid down in *Cradock* v. *Piper*: see *Re Corsellis*, 34 Ch. D. 675.

An originating summons under Order 55 would be a proceeding within the rule. But this rule of practice must not be extended.

Re Corsellis.

The case of *Re Corsellis* (*supra*) affords a good example of the general rule and of the exception introduced by *Cradock* v. *Piper*. The particular items to which the exception was alleged to extend were reducible into five classes—(1) The profit costs of a summons for maintenance of the infant *cestui que trust* (not made in any action) to which summons the solicitor trustee and his co-trustee were respondents; (2) The profit costs of an administration action to which the solicitor trustee, who had then become *sole* trustee, was made defendant; (3) The profit costs for work done by the solicitor trustee while acting as solicitor for the receiver appointed in the action in passing his receivership accounts; (4) The charges in respect of the granting of leases of the trust estate, such leases being in fact granted *on the employment of the trustees*, although half the costs were paid by the lessees; and (5) The customary fees received by the partner of the solicitor trustee as steward of a manor, such partner having been appointed by the trustees who were, in their capacity of trustees, lords of the manor, the manor forming part of the trust estate.

The Court of Appeal held, reversing the decision

(*p*) This rule laid down in 1850 has ever since been followed in practice in the taxing-master's office: see *Burgess* v. *Vinicome*, 34 Ch. D. at p. 83. The decision in *Bainbrigge* v. *Blair*, 8 Beav. 588, must be taken to have been overruled by *Cradock* v. *Piper*, 1 Mac. & G. 664.

Trustee Clauses.

of *Kay*, J., that the costs (class 1) were within the exception: *Cradock* v. *Piper;* class 2 were admittedly within the general rule (*q*); class 3 also fell within the rule as formulated in *Broughton* v. *Broughton*, inasmuch as the trustee had placed himself in such a position that his interest as solicitor for the receiver and his duty as trustee for the estate conflicted. As to class 4, that the trustee having acted in fact upon the employment of the trustees, the case came within the rule that a trustee must not make a profit out of his trust. And as to class 5, that the fees not being professional charges, nor being payable out of the estate at all, and being fixed by custom or statute, fell outside the general rule and also the exception, and that the solicitor-trustee was entitled to the share in those fees which had been carried by his partner to the account of the firm.

Insertion of express power to make professional charges.

It will be advisable where one of the trustees is a solicitor, or even in any event, to meet the case of a future appointment of a solicitor as trustee, that express power should be inserted in the settlement authorising any solicitor-trustee to make professional charges for his services to the trust. But an authority to charge for his professional services will entitle him to charge only for services strictly professional, and not for matters which a trustee ought to have done personally without employing an agent: *Harbin* v. *Darby*, 28 Beav. 325; *Re Chapple*, *Newton* v. *Chapman*, 27 Ch. D. 584. Where it is desired to give the solicitor a further right, the power should be so worded as to include matters not strictly professional, which might have been performed, or would necessarily have been performed in person by a trustee not being a solicitor; see *Re Ames*, 25 Ch. D. 72. But this extended power should not be inserted in a settlement without the express direction of the settlor, and the settlor should be fully informed of the effect of such a direction, and of his legal rights independently of it: *Moore* v.

(*q*) There was no appeal with reference to this class.

Frowd, 3 My. & Cr. 45, 48; *Re Chapple*, *supra*, at p. 587.

Employment of co-trustee as solicitor.

Trustees should bear in mind that if, in the absence of express authority, they employ one of their number who is a solicitor in his professional capacity instead of a stranger, they will be personally liable for any loss to the estate caused by his erroneous advice: *Alton* v. *Harrison* and *Poyser* v. *Harrison*, both cited in Lewin on Trusts, at p. 635.

Other matters relating to trustees.

As to the duties and liabilities of trustees generally with regard to the investment of trust funds, see *ante*, pp. 255 *et seq.*; and as to their dispensing with production of a lessor's title on lending trust money on a leasehold security, and accepting a short title on investing in land: see *ante*, p. 275. It seems advisable still to give to trustees, if desired, express authority to lend on security with less than a marketable title.

Trustee Act, 1888.

The Trustee Act, 1888 (51 & 52 Vict. c. 59), has considerably extended the protection afforded to trustees acting *bonâ fide*, by enabling express trustees to plead the Statute of Limitations in like manner as constructive trustees were formerly able to do.

Statute of Limitations may be pleaded by trustees.

Sect. 8.—"(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a.*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(*b.*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against

Trustee Clauses.

him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

"(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

"(3.) This section shall apply only to actions or other proceedings commenced after the first day of January, one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

Conveyancing, &c., Act, 1881, s. 37.

Power for Trustees to Compound, &c.]—The Conveyancing and Law of Property Act, 1881, sect. 37, giving the trustees power to compromise doubtful questions, enacts that—

Power for executors and trustees to compound, &c.

"(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

"(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

"(3.) As regards *trustees*, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act."

Trustee Clauses.

This power is not exerciseable by an administrator, who derives his authority from the Court, and not from the testator, and who might possibly be a creditor: *Re Clay and Tetley*, 16 Ch. D. 3.

Power not exerciseable by administrator.

It would seem that where there are several trustees, all must concur in exercising this power, unless there is an express power enabling the action of a majority to bind them all: see Lewin on Trusts, 591.

All trustees must concur.

A power is often given to trustees to apportion, as between the several parties interested under the settlement, funds subject to different trusts which may become blended; also to determine what part of the trust funds is to be regarded as capital, and what part is to be applicable as income.

Power to apportion blended trust funds.

CHAPTER VII.

REAL SETTLEMENTS.

PAGE

1. Of the Rights of Husbands and Wives in Each Other's Real Estate.
   - *Wife's Interest in her Husband's Freeholds and Copyholds of Inheritance* 358
   - *Husband's Interest in his Wife's Freeholds of Inheritance* 361
   - *Dower and Curtesy in respect of Expired and Determinable Estates* 370

2. Of Real Settlements generally.
   - *Origin and Progress of Real Settlements* 371
   - *Settlements of Realty on Marriage*..... 374
   - *Family Re-settlements* 376

3. Parties and Recitals..... 383

4. Of Limitations in Real Settlements.
   - *Limitation of Use till Marriage*..... 384
   - *Pin Money* 384
   - *Estates for Life—Waste* ... 387
   - *Limitations to Trustees to Preserve Contingent Remainders* 398
   - *Jointure Rentcharge* 401
   - *Limitations of Portions Term* 403
   - *Estates Tail, &c.*..... 432

5. Of Powers.—The Settled Land Acts 436

6. Of Shifting Clauses.
   - *General Rules as to Framing Shifting Clauses*..... 499
   - *Succession to Title or to another Estate.* 499
   - *Name and Arms Clauses* ... 502
   - *Conditions as to Residence*... 503

7. Of Renewable Leaseholds 505

8. Of the Settlement of Personalty to go with Realty 511

9. Trustee Clauses in Real Settlements..... 517

1. Of the Rights of Husbands and Wives in each Other's Real Estate.

Mutual Rights of Husbands and Wives over Realty.

Wife's Interest in her Husband's Freeholds and Copyholds of Inheritance.]—Before discussing the nature and form of real settlements it is proposed briefly to indicate what are the rights, in the absence of settlement, of a wife over her husband's realty, and *vice versâ*.

Definition of dower.

Dower is the provision made by the law for a widow out of her husband's freeholds of inheritance. It is the estate for life, to which the wife surviving

Mutual Rights of Husbands and Wives over Realty.

the husband becomes entitled in one-third part of all the freeholds of inheritance in possession of which he was solely possessed at his death, and to which any issue of his might by possibility have been heir, provided he has not disposed of it by his will: see the Dower Act (3 & 4 Will. 4, c. 105), s. 4.

Gavelkind and Borough-English lands.

Out of this proposition must be excepted lands held by tenure of Gavelkind and Borough-English, in which the widow's interest is different. In the former she takes a moiety so long as she continues chaste and unmarried; or, by the better opinion, absolutely during widowhood; Co. Litt. 141 a; Rob. Gav. 155; in the latter, she has an absolute estate for life in the whole: 2 Bl. Com. 82.

Requisites to dower.

Dower attaches, unless the widow's right has been defeated, to all the husband's freeholds of inheritance, as well estates tail as estates in fee simple: Co. Litt. 224. In order to entitle a woman to dower she must be a lawful wife. And it is said that she must be of the age of nine years at her husband's death; 1 Roll. Abr. 675 (A); the age of nine years seems to have been fixed with a view to the capability of having issue, which was supposed to exist at this age; but it is difficult to understand how there could be a legal marriage of a woman under twelve years of age: 1 Bl. Com. 439; see also stat. 18 Eliz. c. 7. The capability of having issue, once begun, is never in legal intendment determined; and therefore, the advanced age of the wife at the time of the marriage is no objection to her claim: 1 Roll. Abr. 675 (A); Co. Litt. 40 a. The wife's adultery creates a forfeiture of dower by the express enactment of the Statute of Westminster the Second (13 Ed. 1, c. 34).

Extent of dower.

Dower extends to all lands and tenements: Co. Litt. 30 b; 2 Bl. Com. 131. It arises in respect of mines wrought during the coverture, but not in respect of mines or strata unopened. If land assigned for dower contain an open mine, the dowress may work it for her own benefit. Dower of mines may be assigned by metes and bounds if practicable; otherwise, either by a proportion of the entire pro-

Mutual Rights of Husbands and Wives over Realty.

duce, or the entire produce for a limited time. If the heir, being of full age, assign excessive dower he has no remedy at law; but if excessive dower is assigned while he is under age, he may have relief by writ for admeasurement of dower: *Stoughton* v. *Lee*, 1 Taunt. 402.

Actual seisin or possession of husband not necessary to support dower.

The seisin or possession of the husband need not be a seisin or possession in fact; a right to possession, enforceable by legal proceedings, is sufficient, because the wife, having no power to compel the husband to enter, ought not to be prejudiced by his omitting to do so. Thus, if an heir dies before entry, his widow will be dowable: Litt. 448; and even if an abatement takes place after the ancestor's death, yet, the wife may claim her dower, if the marriage was before the abatement: 1 Bro. Abr. 255, pl. 17.

Equitable inheritance.

Formerly, in order to entitle a widow to dower, the husband must have been legally seised of the lands, and not possessed of the equitable inheritance only; but by sect. 3 of the Dower Act widows are entitled to dower out of equitable estates. The widow's right to sue in equity may be barred by delay in taking proceedings: *Marshall* v. *Smith*, 34 L. J. Ch. 189.

The Dower Act.

The operation of the Dower Act has deprived the question as to right to dower of much of its former importance, as the right of a wife married subsequently to the 1st January, 1834, is barred by an alienation by the owner of the land either by conveyance *inter vivos*, or by a specific or even a general devise contained in his will: sect. 4; and see *Lacey* v. *Hill*, L. R. 19 Eq. 346. The right is postponed to partial estates and interests, charges created by disposition or will of the husband, and debts, &c., to which the land is liable: sect. 5; but not to the husband's simple contract debts: *Spyer* v. *Hyatt*, 20 Beav. 621; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421. Dower may also be barred by a declaration in a deed or in the husband's will: sects. 6, 7; see, as to what is a sufficient declaration, *Fry* v. *Noble*, 7 De G. M. & G. 687; *Fairley* v. *Tuck*, 6 W. R. 9. A husband may by his will subject his wife's right

to dower to conditions or restrictions: sect. 8; and a devise by his will of any real estate to her will bar her right: sect. 9; but not so a bequest to her of personalty, or a gift of or out of land not liable to dower: sect. 10. In consequence of these enactments the old form of conveyance to uses to bar dower (as to which see sub tit. "PURCHASE DEEDS," Vol. V., p. 119, n.) has become obsolete.

Mutual Rights of Husbands and Wives over Realty.

The widow's title to freebench in copyholds is regulated by the custom of the particular manor. Generally speaking, the widow is only entitled to freebench in the lands of which the husband died seised: see *Godwin* v. *Winsmore*, 2 Atk. 526. And even if the admittance, on the husband's surrender, is not made until after his decease, she is excluded; for though the husband in such a case dies actually seised, yet, the subsequent admittance relates back to the time of the surrender: *Benson* v. *Scott*, 3 Lev. 385. So, where a copyholder dies after a contract for sale of copyholds, the contract will be carried into execution against the widow: *Hinton* v. *Hinton*, 2 Ves. sen. 631; *S. C.*, Amb. 277; *Brown* v. *Raindle*, 3 Ves. 256. By the custom of some manors a fine is payable on acquiring freebench.

Freebench.

In lands held *pur autre vie*, limited to the husband and his heirs, the wife takes no estate or interest whatsoever: see *Atkinson* v. *Baker*, 4 Durn. & E. 229. If the land is vested in the husband without words of limitation, or in him, his executors or administrators, it is distributable in like manner with leaseholds for years, as part of his personal estate, which, it is well known, devolves, in the event of his dying intestate, after payment of his debts, to the widow and children, the former taking one-third and the latter two-thirds, or if there is no child or descendant of a child, to the widow and the next of kin, in equal shares: 22 & 23 Car. 2, c. 10; and see sub tit. "WILLS." Vol. VII., pp. 714 *et seq.*

Destination of husband's freeholds *pur autre vie.*

Husband's Interest in his Wife's Freeholds.]—Of the freehold lands of the wife, whether of inheritance or not, except in cases coming within the operation of the Married Women's Property Act, 1882,

Freeholds of inheritance.

Mutual Rights of Husbands and Wives over Realty.

the husband and wife are seised in her right during the coverture: on the determination of which by the death of the husband, the wife surviving resumes the sole ownership which pertained to her before the marriage in the same manner as if it had not been interrupted by that event; see *Fitzer* v. *Fitzer*, 2 Atk. 514. If, however, she was married on or since the 1st January, 1883, or, if she was married before that date, but her title accrued thereafter, her realty is held by her as her separate property as if she were a *feme sole*, and she can dispose of it by will or otherwise without her husband's concurrence. Freeholds of inheritance of the wife will also, unless so disposed of, descend to the heir to the exclusion of the husband, unless the latter becomes entitled for his life, as tenant by the curtesy—a species of estate which calls for a particular examination.

Requisites to curtesy.

Curtesy, like dower, does not attach to freeholds not of inheritance, nor to reversions or remainders: Co. Litt. 29; nor to lands held in joint tenancy: Ibid, 30; it attaches to estates tail as well as estates in fee simple: Ibid, 296, 224, a.: but, unlike dower prior to 1834, it always attached to the equitable inheritance. So, curtesy attaches to an equity of redemption: *Casborne* v. *Scarfe*, 1 Atk. 603; and to executory as well as executed trusts: *Watts* v. *Bell*, 1 P. Wms. 108.

Distinction between curtesy and dower.

Curtesy differs from dower in three important particulars:—1st. That it arises only when the wife has issue by the husband capable of inheriting; while dower merely requires in the wife the possibility of having inheritable issue. 2ndly. That it is generally confined to lands of which the husband and wife in her right, are, or (according to recent decisions) of which the wife alone is, seised or possessed in fact; while dower extends to lands over which the husband has an enforceable claim to possession. 3rdly. That curtesy is not forfeited for adultery, as dower is: *Sidney* v. *Sidney*, 3 P. Wms. 276; *Hetherington* v. *Graham*, 3 Moo. & P. 399. Formerly an alien could not claim curtesy, but this disability is removed by the stat. 33 Vict. c. 14, sect. 2.

Mutual Rights of Husbands and Wives over Realty.

In regard to the first requisite to curtesy, it is to be observed, that it is not necessary that the seisin and birth of issue should be contemporaneous. If, therefore, A. have issue by her husband B., which issue die, and these lands which the issue, if living, might have inherited descend to her, then B., having entered and survived A., will be tenant by the curtesy: Co. Litt. 29 b.; Perk. s. 473; so that the capacity of the issue which is requisite is a capacity of inheriting the wife's freeholds generally, not a capacity of inheriting these particular lands.

Curtesy contingent on birth of heritable issue.

By the custom of Gavelkind (Kent) the husband takes a moiety until remarriage, whether he has issue or not: Co. Litt. 111.

Secondly, the necessity of actual seisin may be illustrated by the following case:—Lands descend to a wife; but before the husband enters, the coverture is determined by the death of the wife; the surviving husband has no curtesy: Co. Litt. 29. But in order to constitute a seisin in fact, if the estate is in lease, actual receipt of rent is not essential: *De Grey* v. *Richardson*, 3 Atk. 469. So, if the equitable interest is in the possession of a stranger, adversely to the right of the wife, it seems that there is no such actual seisin as is necessary to support the husband's right to curtesy.

Seisin in deed generally necessary to support curtesy.

But if actual seisin or possession cannot by any means be acquired, the husband will nevertheless be entitled to curtesy. "And first of what seisin a man shall be tenant by the curtesie. There is in law a two-fold seisin, viz., a seisin in law and a seisin in deed. And here Littleton intendeth a seisin in deed if it may be attained unto. . . . A man seised of an advowson or rent in fee hath issue a daughter who is married, and hath issue, and dyeth seised, the wife, before the rent became due or the church became voyd, dyeth, she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attaine to any other seisin. *Et impotentia excusat legem:*" Co. Litt. 29 a. And see *Eager* v. *Furnival*, 17 Ch. D. 115, where a husband was held to be entitled to curtesy by the operation of sect. 33

Exception where actual seisin cannot be attained.

Mutual Rights of Husbands and Wives over Realty.

of the Wills Act (see Vol. VII., p. 479), out of lands devised to his wife, who predeceased the testator.

The distinction between dower and curtesy in regard to the different nature of the seisin necessary to support it, is not merely arbitrary, but has some foundation in reason, being evidently to be traced to the fact that the husband had generally before 1883, the power of entering upon lands the inheritance of the wife, and therefore ought to suffer for his neglect to do so; while on the other hand the wife having no power to enter upon her husband's lands, her provision is properly made independent of such entry.

Limitation to separate use does not exclude curtesy.

The question whether curtesy attaches to freeholds expressly limited to the separate use of the wife has been the subject of much conflict of judicial decision. In *Heazle* v. *Greenbank* (1 Ves. Sen. 307; *S.C.*, 3 Atk. 715) a testator devised freeholds to trustees to the sole and proper use of his daughter *for her life*, to be at her own disposal, with power notwithstanding coverture to dispose thereof; and Lord *Hardwicke* held that the daughter's husband was not entitled to curtesy, inasmuch as he had no seisin in right of his wife during the coverture. His Lordship had, however, previously in the case of *Roberts* v. *Dixwell*, 1 Atk. at p. 609, expressed a contrary opinion. And this view was adopted by *Leach*, V.C., in *Morgan* v. *Morgan*, 5 Madd. 408, and by *Shadwell*, V.-C., in *Follet* v. *Tyrer*, 14 Sim. 125; in both these cases the separate use extended only to the wife's life estate. In *Moore* v. *Webster*, L. R. 3 Eq. 267, where freeholds were devised to the separate use of a married woman *in fee*, *Stuart*, V.-C., held that the husband not having any legal or equitable seisin, was excluded from being tenant by the curtesy. But in *Appleton* v. *Rowley*, L. R. 8 Eq. 139, where the circumstances were similar, *Malins*, V.-C., said that the true criterion was whether the wife is seised of an equitable estate of inheritance, and held the husband to be entitled. In *Cooper* v. *Macdonald*, 7 Ch. D. 288, *Jessel*, M.R., treated it as settled law that where a married woman has an estate of inheritance to her separate

Mutual Rights of Husbands and Wives over Realty.

use, and does not dispose of it by deed or will, her husband is entitled to curtesy. The same learned judge reasserted this opinion in *Eager* v. *Furnival*, 17 Ch. D. at p. 119. And the correctness of this view has been assumed by *Bacon*, V.-C., in *Shurmur* v. *Sedgwick*, 24 Ch. D. at p. 605. It would thus seem to be established by a great preponderance of modern decisions that curtesy is not excluded by a limitation to the separate use of the wife, either for life or in fee. See also Lewin on Trusts, 735; Vaizey on Settlements, 793, *et seq.*

Whether curtesy is excluded by the operation of the Married Women's Property Act, 1882.

A question of considerable difficulty arises as to whether or not the effect of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) is to destroy the husband's right by the curtesy where the marriage has taken place, or where the wife's title has accrued since the commencement of that Act. On the one hand it seems to be arguable that logically, having regard to the principle and essential characteristics of curtesy, the right must, in such cases, be gone. This view is thus stated by Messrs. Wolstenholme & Turner (Conveyancing Acts, p. 9):—"The estate by the curtesy was an extension during the husband's whole life (arising on the birth of inheritable issue) of his freehold in right of his wife during the joint lives (Burton, R. P., 145, 146), where the estate of the wife was an inheritance in possession (Fea., C. R., 341, 342). If the estate by the curtesy still exists, it is wholly changed in its nature. The husband has no present freehold in his wife's right, nor can he have any remainder, there being no particular estate. He must take, if at all, by *quasi* descent in the same manner as the heir. It seems difficult to say that the Act impliedly creates a new kind of descent." It was formerly considered that the title of the husband accrues, if at all, during the wife's life, upon the birth of issue of the marriage, though it only becomes complete or "consummate" on her death: "A woman taketh husband and hath issue, lands descend to the wife, the husband enters, and after the wife is found an ideot by office, the lands shall be seized by the king, *for the title of the tenancy by the curtesie and of the*

Mutual Rights of Husbands and Wives over Realty.

king begin at one instant, and the title of the king shall be preferred:" Co. Litt. 30 b.; and see Hargreave's Notes. But see *contra, Jones* v. *Davies,* 8 Jur. N. S. 592. The close connection between the husband's estate during the coverture and his right by the curtesy is illustrated by the distinction, above adverted to, between curtesy and dower, in that legal or equitable seisin is generally necessary to support the former and not the latter, inasmuch as the husband can at any time during the coverture enter on the wife's lands by reason of his estate, while the wife has no power of entry on the lands of her husband. Again, the language of the statute might seem, at first sight, by implication to negative the claim to curtesy. It provides by sect. 1 (1) that a married woman shall, in accordance with the Act, be capable of holding any real property "as her separate property, in the same manner as if she were a *feme sole,* without the intervention of any trustee;" and by sects. 2 and 5 every woman married before the commencement of the Act, or married before that date, as to property her title to which accrues thereafter shall be entitled to hold as her separate property all real property to which she is, or may become, entitled. The expression "as a *feme sole*" might seem open to a construction which would deprive the husband of all rights and interests in his wife's property, either during the coverture, or after her death; and it is submitted that this construction does not necessarily oust her eldest son from taking her realty as heir-at-law, for the term "*feme sole*" applies equally to all women not under a present coverture, whether maids or widows. Moreover, it is quite clear that the statute has entirely destroyed the husband's estate in his wife's realty during the coverture, which, according to the old text writers, was the foundation on which the superstructure of curtesy, in certain events, rested.

On the other hand, this last consideration has lost much of its force by reason of the decisions, cited above, which seem to have established that the seisin necessary to support curtesy may be that of the wife,

Mutual Rights of Husbands and Wives over Realty.

or of trustees for the wife, for her separate use, so that the separate use whether attached to her life-interest, or to the fee, will not exclude the right. Again, curtesy is nowhere expressly referred to in the Act, and it is difficult to believe that the Courts would hold an old-established and well-known right to be abolished unless the intention of the Legislature to abolish it was necessarily to be implied from the words of the Act, which does not seem to be the case. It does not necessarily follow that, because the connection between the husband's estate during the coverture and his right by the curtesy has ceased by reason of the destruction of the former, therefore curtesy has been put an end to; it may well be the effect of the statute that merely one of the conditions formerly necessary to support curtesy is now dispensed with, as has been already done by judicial decision in the case of the limitation of a legal or equitable estate to the wife's separate use, but that the right continues nevertheless. In the next place, the argument from the use of the expression "as a *feme sole*" cannot now be much relied on: it has been held that its use does not as regards personal estate oust the husband from his former rights thereto on an intestacy: *Re Lambert, Stanton* v. *Lambert,* 39 Ch. D. 626. In that case (at p. 635), *Stirling,* J., said: "The Act simply confers on married women the capacity to acquire, to hold and dispose of, by will or otherwise, property as if they were *femes sole.* None of these matters are in question. The acquisition and holding of the property are past and gone. The dispute is as to the devolution of property undisposed of. Now with this the Act does not purport to deal." See *Smart* v. *Tranton,* 40 Ch. D. 165. See also (as illustrating the apparent tendency of the Courts in construing the Act) the decisions in *Symonds* v. *Hallett,* 24 Ch. D. 346; *Re March,* 27 Ch. D. 166; *Re Jupp,* 39 Ch. D. 148; and *Butler* v. *Butler,* 14 Q. B. D. 835 (*ante,* p. 132, note. It would seem from these decisions that the intention and operation of the Act is merely to enable a married woman, during the coverture, freely to dispose of her property real and personal

Mutual Rights of Husbands and Wives over Realty.

without the intervention or concurrence of her husband, and not to alter the devolution on her death of her property not so disposed of. The purpose of the Act is, as it is submitted, having regard to the decisions last above referred to, merely the protection and benefit of married women; and in the words of *Malins*, V.-C. (with reference to limitations to the separate use of a wife), "it would be contrary to principle that a clause introduced for the benefit and protection of the wife should prevent the husband from having his right to curtesy:" see *Appleton* v. *Rowley*, L. R. 8 Eq. at p. 142. On the whole, therefore, it is conceived that the right of the husband to curtesy in the wife's freeholds not disposed of by her by deed or will, remains in full force notwithstanding the Act, as it did before the Act as to such property if limited to or in trust for her for her separate use.

Trusts for conversion.

In the contemplation of equity, money impressed with the character of realty has the incidents of real estate; and, by an obvious application of this doctrine, it is held that, if by marriage articles or any other instrument, money is directed to be laid out in land, to be settled to uses, under which limitations, if executed, the husband of the *cestui que trust* would have been tenant by the curtesy, he will be entitled to a corresponding interest in the money, until it is laid out: *Cunningham* v. *Moody*, 1 Ves. sen. 174; *Dodson* v. *Hay*, 3 Br. C. C. 404.

Hence, it frequently happens, that the husband's claim to curtesy raises the question, whether, according to the rules of construction applied by Courts of Equity to such trusts (which forms a distinct topic of inquiry, see sub tit. "Wills," Vol. VII. pp. 482 *et seq.*), the wife takes an estate tail, or any other estate of inheritance, or a less interest: see *Dodson* v. *Hay*, 3 Br. C. C. 404.

Curtesy in copyholds.

Curtesy is not incident to copyholds except by special custom, and its quantity and duration depend on such custom: *Paulter* v. *Cornhill*, Cro. Eliz. 361. By the custom of some manors the husband takes the lands for life; in others only while he remains unmarried; in others, again, he takes only a moiety or other portion: *Ewer* v.

Mutual Rights of Husbands and Wives over Realty.

Astrike, 1 And. 192; Rob. Gav. B. 2, c. 1. The birth of inheritable issue is not always required to create the right. Where the custom exists it will be construed strictly; thus, where the custom is that if a man marries a customary tenant he shall have curtesy, it was held that the woman must be a copyholder at the time of the marriage: *Sir John Savage's Case*, 2 Leon. 109 (*r*). But her actual admission is not essential where her title would be complete without admission: *Doe* d. *Milner* v. *Brightwen*, 10 East, 583. In some manors where a man acquires a right by the curtesy in copyholds, a fine is payable; in others not: Cru. Dig. tit. x., ch. iv. s. 4.

Curtesy defeated by alienation or declaration.

Of course the right to curtesy is defeated by the wife's alienation of her lands: *Cooper* v. *Macdonald*, 7 Ch. D. 288; and the husband takes the property subject to all the incumbrances which affected it in the hands of the wife: Dy. 51 b., n. 17. A declaration by the wife in her will to the effect that her lands shall not be subject to curtesy, will effectually bar the husband's right.

Effect of settlement in preventing curtesy.

Curtesy, at the present day, is not often permitted to arise in lands of which the wife is seised at the time of the marriage, which are commonly put into settlement. It sometimes happens that a settlement operates to deprive the husband of his curtesy, without being an effectual alienation of the inheritance; so that the husband loses the estate which he would have had by act of law, without acquiring any estate by act of party. As where a woman, by lease and release (without fine or recovery), conveyed lands, of which she was tenant in tail, to the use of her intended husband for life, remainder to herself for life, remainder to the first and other sons of the marriage; the wife died in the lifetime of the husband by whom she had issue: it was held that he had no estate either under the settlement or as tenant by the curtesy; for the deed being inoperative to bar the issue, could give him no indefeasible estate; but it excluded him from curtesy, because,

(*r*) This decision was disapproved of in *Clements* v. *Scudamore*, 1 P. Wms. 62; see Watkins on Copyholds, 4th ed. Vol. 2, p. 7.

Mutual Rights of Husbands and Wives over Realty.

on the instant of the marriage taking effect, the estate was vested in the husband, during the joint lives of himself and his wife, under the settlement; and there never was one moment during the coverture when the wife was seised in possession of the estate tail, so as to make the husband tenant by the curtesy thereof: *Doe* d. *Neville* v. *Rivers*, 7 Durn. & E. 276.

Statutory powers of tenant by the curtesy.

By sect. 58 (1, viii.) of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), the statutory powers of a tenant for life are given to a tenant by the curtesy when his estate is in possession.

Wife's freeholds *pur autre vie*,

Freeholds *pur autre vie*, limited to the heirs of the wife, will devolve on the heir, whether lineal or collateral, to the complete exclusion of the husband, who has no right by the curtesy therein. On the other hand, freeholds *pur autre vie*, limited to her personal representatives, or to her *simpliciter*, belong to the husband, on his taking out letters of administration, subject, of course, to the claims of her creditors.

Dower and curtesy in respect of expired estates tail.

Dower and Curtesy in respect of expired and determinable Estates of Inheritance.]—Dower and curtesy are not necessarily determined by the expiration of the estate in respect of which they, or the inchoate rights thereto, have arisen. Thus, if a man tenant in tail die without issue, his widow will nevertheless be dowable: Perk. s. 317. So the surviving husband of a woman tenant in tail having had inheritable issue will be entitled to curtesy: *Paine's case*, 8 Rep. 34. The doctrine seems sound in principle, because, as dower and curtesy are incidents of an estate tail, that estate cannot be considered as absolutely determined while the incident remains. In regard to estates of inheritance, however, which are determined by the happening of some collateral event or contingency, the case might seem to be different, since the estate does not expire, but is abruptly broken off, which disruption might be supposed necessarily to carry away with the estate itself all the derivative branches and incidents of such estate in like manner as an appointment which overreaches an estate of inheritance (independently of the Dower Act) defeats the dower which has

Mutual Rights of Husbands and Wives over Realty.

during the coverture incipiently attached to the estate (see *Ray* v. *Ray*, 5 B. & Al. 561) and would, it is clear, determine the dower itself if it had attached in possession by the decease of the owner of the inheritance previously to the exercise of the power by a donee other than the deceased owner. In spite however of this seeming analogy, and in opposition to at least one distinct authority (*Sumner* v. *Partridge*, 2 Atk. 47), curtesy and dower, which are evidently subject to the same rule, have been adjudged to subsist after the determination of a defeasible fee; Lord *Mansfield* founded this decision principally on the ground that before the statute *De Donis* the husband might have been tenant by the curtesy of a conditional estate: *Buckworth* v. *Thirkell*, 3 B. & P. 652 n.; 10 Moo. 235 n. This doctrine has been followed in *Goodenough* v. *Goodenough*, 2 Dick. 795, and *Moody* v. *King*, 10 Moo. 233.

As to derivative estates.

It is however clear that if the inheritance, in respect of which the curtesy or dower has attached, is a derivative estate, and the original estate out of which it is derived fails, the curtesy or dower necessarily ceases. Thus, if a tenant in tail (not having the reversion in fee) convey his estate by fine (*a*) to A. and his heirs A.'s widow will be entitled to dower so long as any object of the entail is living, but, on failure of issue, the person in remainder will be entitled to the estate discharged from the dower: *Seymour's Case*, 10 Rep. 95 a. 96.

2. Of Real Settlements Generally.

Origin and Progress of Real Settlements.]—The history of the origin and development of settlements of realty is one of great interest, but is one which must here be treated very briefly and so far only as is necessary for better understanding the nature and form of a modern real settlement (*b*).

(*a*) The effect of a fine was merely to create a base fee; an estate tail could be completely barred only by means of a recovery.

(*b*) A clear and succinct statement of the gradual progress of

Origin, &c., of Real Settlements.

Estates in fee simple conditional.

The earliest form of settlement seems to have been the creation of an estate in fee simple conditional, which had the effect as well of suspending the absolute power of alienation, till the birth of issue, as of preserving the inheritance in a particular line of succession, so as to make it devolve through a particular line of heirs to the exclusion of others. Thus, the estate might be settled on an eldest son and the heirs of his body, and in default or failure of such heirs, then to the second son and the heirs of his body, with like limitations to other sons successively and their respective issue; and in default of all these, to the settlor and his heirs. The power of alienation of estates in fee simple conditional was taken away by the Statute *De Donis Conditionalibus*, which created estates tail, leaving a reversion in fee to the donor. But the introduction of common recoveries in the reign of Edward the 4th, and of fines by the statute of 4 Henry 7, c. 24, restored the power of alienating estates tail.

Estates tail of married women *ex provisione viri.*

The next stage of settlements took its rise under the operation of the stat. 11 Hen. 7, c. 20, whereby women seised of estates tail *ex provisione viri*, that is of the gift of their husbands, were prohibited from alienating these estates. And accordingly the practice grew up of limiting the husband's estates to him and his wife and the heirs of the body of the wife by the husband. The estate was thus secured to the parents during their lives, and to the issue after their deaths, unless both the parents concurrently, during their joint lives, or, as it would seem, the surviving husband, should alienate the estate; a surviving wife, taking *ex provisione viri*, could not dispose of the estate, without the concurrence of the issue. The stat. 32 Hen. 8, c. 28, by enabling tenants in tail to grant leases binding on their heirs conveniently supplemented the former enactment, and thus provided a rational and fairly satisfactory mode of simple settlement. The stat. of Hen. 7, is repealed

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settlement will be found in Butler's note I. v. to Co. Litt. 290 b., from which the remarks in the text are taken in an abridged form.

Origin, &c., of Real Settlements.

by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), sect. 17.

Limitations of estates for life with remainders over.

Gradually, however, a more complex form of settlement came into use, whereby estates for life were limited to the parents, with remainder to their unborn children by purchase. The earliest known instances of this is that of the feoffment in *Chudleigh's Case* (reported 1 Rep. 120 a.; Popham, 76) in the year 3 & 4 Ph. & M. (1556). But, where property was thus settled, the parent with the concurrence of the immediate reversioner, or alone, if he was the immediate reversioner, could deprive the unborn issue of their estate: see *Chudleigh's Case, supra, Archer's Case,* 1 Rep. 66 b. And this mode of settlement did not become general till the plan was devised of limiting an estate during the life of the parent to trustees for preserving contingent remainders. This limitation is said to have been introduced by Sir Orlando Bridgman during the time of the Usurpation; see *Garth* v. *Cotton,* 1 Ves. sen. 524. Under it the trustees took a vested estate of freehold; the interposition of the estate prevented the tenant for life from surrendering to the reversioner; the alienation of the estate by the tenant for life would determine the life estate and let in the trustees; and if the trustees joined in the alienation, then a purchaser with notice was made to hold the land upon the trusts of the settlement, and, if the purchaser had no notice, the trustees were guilty of a breach of trust, and compellable to purchase lands of equal value, and to settle them upon the trusts of the lands conveyed: see *Mansell* v. *Mansell,* 2 P. Wms. 678; *Pye* v. *Gorge,* 1 P. Wms. 128; *Moody* v. *Walters,* 16 Ves. 283. The necessity for inserting in strict settlements limitations to trustees upon trust to preserve contingent remainders is done away with by the operation of the stat. 8 & 9 Vict. c. 106, which rendered contingent remainders indestructible by forfeiture, surrender, or merger of the preceding estate of freehold, and deprived feoffments of their tortious operation: see sub tit. WILLS, Vol. VII. p. 427.

Origin, &c., of Real Settlements.

Powers operating under the Statute of Uses.

A further stage in the progress of settlements was effected by the introduction of powers under the Statute of Uses. "By these as complete a dominion over the property which is the subject of the settlement is given to the party and his trustees, as if it were not the subject of settlement; at the same time that the property or its value is completely secured to the parties, to their issue, and to all other claimants": Butler's note to Co. Litt. 290 b. The insertion of express powers of sale, leasing, &c., is now rendered generally unnecessary by reason of the statutory powers given to tenants for life by the Settled Land Act, 1882.

Form and contents of marriage settlements of realty.

Settlements of Realty on Marriage.]—When a settlor brings into strict settlement realty to which he or she is absolutely entitled or over which he or she has an absolute power of disposal, the limitations and provisions are generally of a comparatively simple character, and exhibit little variety of form. The property is by the deed of settlement assured to the trustees by means of an appointment or other appropriate mode of conveyance to hold to the uses declared by the settlement. These limitations are usually to the use of the settlor in fee simple until the marriage shall take place, and thereafter (where the settlement is by the husband), to the use that the wife may receive out of the rents and profits a yearly rent-charge by way of pin-money; subject thereto, the property is limited to the use of the husband for his life, without impeachment of waste, with remainder (unless a life estate in the property is given to the wife after the husband's death which is sometimes the case with regard to small properties) to the use that the wife, if she shall survive her husband, may receive during her life out of the rents and profits a yearly rent-charge by way of jointure. If the wife is the settlor these limitations will require modification. Subject as aforesaid, the property is usually limited to the trustees of the settlement for a long term of years without impeachment of waste for the purpose of providing portions for younger children which are intended to override the estate

Real Settlements on Marriage.

thereafter given to the eldest son. The trusts of the term are declared in a subsequent part of the settlement so as not to break the continuity of the limitations. Estates tail are then given successively to the eldest and every other son of the marriage, and these may be followed either by gifts of similar estates in succession to the eldest and other daughters, or by a gift to all the daughters as tenants in common in tail with cross limitations in tail between them; and these again, if desired, by limitations of successive estates for life and in tail to collaterals and their issue, but these are not very usual in the case of settlements on marriage, unless the property to be settled belongs to a person other than the intending husband or wife. The ultimate limitation will be to the use of the settlor in fee simple. Shifting clauses are sometimes introduced intended to operate in defeasance of the estates created by the settlement in certain specified events, *e.g.* in case the eldest son should succeed to a specified family estate, or if a person, to whom an estate is given by the settlement, should not within a specified time assume a particular name and arms; in such cases the estate of the person so succeeding or making default is made to determine on the happening of the event, and the next taker immediately becomes entitled in possession either by way of shifting use or by acceleration of his estate. Next in order comes the declaration of the trusts of the term for raising the portions; and this is followed by the insertion of such powers as may be thought necessary or advisable for enabling parties interested under the settlement to take the full benefits intended to be given to them, or to provide for the management of and dealings with the property during the continuance of the settlement. Formerly, powers were usually given to the trustees for the management of the settled lands and receipt and application of the rents and profits during the minorities of persons for the time being entitled in possession, but the insertion of these is now generally rendered unnecessary by reason of the statutory powers for those purposes given to trustees by sect. 42 of the Conveyancing and Law of Property Act, 1881 (44 & 45

Real Settlements on Marriage.

Vict. c. 41). If however it is desired to give the settlor power of jointuring a future wife, and of charging portions in favour of the children of a future marriage, express powers to this effect must be given to him. Also, if the limitations of the settlement extend to collaterals and their issue similar powers of jointuring and charging portions may be given to the subsequent tenants for life; but these limitations to collaterals are not very usual where the settlor is one of the intended spouses. Next in order will follow any provisions which may be thought advisable modifying or extending the powers given to tenants for life by the Settled Land Act for managing and dealing with the estate by way of lease, sale, enfranchisement, exchange, partition, &c. Express powers for these purposes were previous to 1883 commonly inserted in real settlements and thereby made exerciseable by the tenants for the time being in possession or by the trustees with his consent, but the statutory powers seem to be amply sufficient in ordinary cases, and such express powers are now usually omitted. If copyholds or leaseholds are included in the settlement as well as freeholds, they will be vested by means of separate witnessing parts in the trustees by appropriate forms of conveyance to hold upon trusts corresponding as near as may be with the uses, declared in the earlier part of the settlement, of the freeholds. The settlement will conclude with a clause nominating the persons who are from time to time to fill up vacancies in the number of trustees expressed. Covenants for title may be regarded as obsolete, so far as the settlement of lands in England are concerned.

Form and contents of family settlements of realty.

Family Resettlements.]—Resettlements of lands and hereditaments which are subject to the limitations and provisions of earlier settlements are usually effected on the occasion of the coming of age of the eldest son, or other first tenant in tail in remainder expectant on the decease of the tenant for life in possession, or of the marriage of such tenant in tail. The tenant for life and tenant in tail in the first place join in barring the entail of the latter under

Family Resettlements.

the original settlement: this may be done either by means of the deed of settlement or by a separate disentailing deed, limiting a general power of appointment under which the settlement is made; but for reasons which will be explained hereafter the latter course is the more convenient, and usually adopted. By the deed of settlement the property is settled afresh, the estate tail of the first tenant in tail being reduced to a life estate, subject to the prior life estate of the tenant for life in possession, and to all jointures or other charges, if any, by virtue of the original settlement, or otherwise overriding the last mentioned life estate, and to charges for the jointure of the wife of the tenant for life in possession, and for portions for his younger children. By the deed of resettlement the property will generally be charged in priority to the estate of the tenant for life in possession with a rent-charge by way of provision for the remainderman until he comes into possession of his life estate, and also with a provision for his wife in case he should die before coming into possession. Great care must be taken so to frame the limitations as not to make the estate precedent to that of the remainderman subject to charges intended only to affect the latter. Frequently a joint power of appointment is given to the tenant for life in possession and first tenant for life in remainder, which overrides all the limitations of the resettlement; such a power is sometimes convenient for the purpose of raising money at a subsequent time for a particular purpose by sale or mortgage, as the proceeds no less than the lands sold or mortgaged will be applicable under the power for any purpose which may be agreed upon by the donees. After the determination of the estate of the first tenant for life in remainder, the property is given to his first and other unborn sons successively in tail, or in tail male with remainder to such sons successively in tail general, then will follow limitations of life estates and estates tail or tail male and tail general in favour of the other sons and daughters of the tenant for life in possession and their respective issue, frequently followed in their turn by similar limita-

Family Resettlements.

tions in favour of collateral branches of the family. These limitations often extend to great length and are of great complexity, and the order in which the successive takers are to become entitled varies according to the intention of the parties in the particular case. In such a settlement it will generally be thought advisable to give to the successive tenants for life, if and when they shall come into possession, power to jointure their respective wives, and to charge portions for their respective issue. The remarks above made with regard to the powers and provisions in ordinary real settlements apply equally to the case of a family resettlement.

If it is desired to keep on foot any of the powers contained in the original settlement, express provisions to this effect should be inserted in the re-settlement: see *Re Wright's Trustees and Marshall*, 28 Ch. D. 93.

Effect of successive re-settlements of realty.

It will be seen that by a series of resettlements of this nature, family properties may be kept in settlement through successive generations for an indefinite period. Previous to 1883, the lands and hereditaments originally settled could thus be kept inalienable, except so far as rendered alienable by express powers of sale (to which the concurrence of several persons were generally rendered necessary), or by order of the Court. Now, however, by operation of the Settled Land Act, all lands however strictly settled are rendered alienable by tenants for life for the time being in possession. And lands sold are exonerated from the limitations of the settlements which attach instead to the proceeds of sale. A great responsibility is often cast upon family solicitors as regards arranging the terms of family resettlements.

Validity of family settlements effected *bonâ fide*.

Such arrangements, if they are carried out in good faith, with full understanding of their effect, and if the terms are reasonable, and for the general benefit of the family, are favoured by the Court, but they are peculiarly liable to objection on the ground of mistake or undue influence. Where agreements are entered into to save the honour of a family, and are reasonable, a Court of Equity will, if possible, decree a performance of them: per Lord *Hardwicke*, C.,

Family Resettlements.

in the leading case of *Stapilton* v. *Stapilton*, 1 Atk. 2 : S. C. Wh. & T. L. C. Eq. 920. And Lord *Eldon* said in *Gordon* v. *Gordon*, 3 Swanst. at p. 463, "Where family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then although the parties may have greatly misunderstood their situation and mistaken their rights, a Court of equity will not disturb that quiet, which is the consequence of that agreement."

Effect of mistake, ignorance of rights, &c.

But a family settlement will not be supported if founded on a mistake of either party to which the other party is, however innocently, accessory : *Gordon* v. *Gordon*, *supra*; *Hoghton* v. *Hoghton*, 15 Beav. 305 ; *Fane* v. *Fane*, L. R. 20 Eq. 698. It is clear that, generally, a mistake of law which is common to all parties will not vitiate the arrangement : *Pullen* v. *Ready*, 2 Atk. 587. And even where the mistake of law is that of one party only, the Court will require to be satisfied that the conduct of that party was determined by the mistake before setting aside the arrangement : *Stone* v. *Godfrey*, 5 De G. M. & G. 90. So a family arrangement may be sustained notwithstanding a mutual mistake as to a material fact : *Neale* v. *Neale*, 1 Keen, 672 ; see *Heap* v. *Tonge*, 9 Hare, 90. "Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction," per *Turner*, L.J., in *Baker* v. *Bradley*, 7 De G. M. & G. at p. 620 ; but see *Stockley* v. *Stockley*, 1 Ves. & B. at p. 31, and *Ashurst* v. *Mill*, 7 Hare, 502 ; where a family arrangement was varied as being founded on an error as to right which does not appear to have been known to any of the parties.

Improper exercise of parental influence.

Family resettlements have frequently been set aside or varied on the ground of undue influence. The principal parties must frequently stand in the relation to each other of father and son, and the latter, having often only lately attained full age, and being dependent on his father for his immediate needs, is peculiarly likely to be susceptible to parental influence and pressure. Parental influence,

Family Resettlements.

however, if properly exercised, is not regarded by the Courts with disapproval. "In transactions between members of the same family, even though that relation subsists between them, from whence the Court will infer the moral certainty of the existence of considerable influence, and the probability of its having been exercised, yet, if the transaction be one which tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as, upon the most comprehensive experience, has been found to be most for the interest of families": per *Romilly*, M.R., in *Hoghton* v. *Hoghton*, 15 Beav. at p. 300; and see the cases there cited; see also *Cory* v. *Cory*, 1 Ves. sen. 19; *Jenner* v. *Jenner*, 2 De G. F. & J. 359; *Hartopp* v. *Hartopp*, 21 Beav. 259; *Persse* v. *Persse*, 7 Cl. & F. at p. 318; *Dimsdale* v. *Dimsdale*, 3 Dr. at p. 569; *Ex parte Eyre*, 44 L. T. 922; *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200. On the other hand, the Court will closely scrutinise the exercise of parental influence over a young expectant heir, and will set the settlement aside if satisfied that such exercise has been improper, especially if the parent has thereby obtained for himself any personal advantage. "The transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this Court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence": per *Turner*, L.J., in *Baker* v. *Bradley*, 7 De G. M. & G. at p. 620; see also *Heron* v. *Heron*, 2 Atk. 160; *Archer* v. *Hudson*, 7 Beav. 560; *Carpenter* v. *Heriot*, 1 Ed. 338; *Wycherley* v. *Wycherley*, 2 Ed. 175; *Hoghton* v. *Hoghton*, 15 Beav. 278. The fact that the parent obtains some benefit from the transaction will not, however, be sufficient to set aside a settlement in other respects just and reasonable, if the son has agreed to confer it with full knowledge and in the exercise of his free and unbiassed judgment: *Archer* v. *Hudson*, 7 Beav. 560; *Hoghton* v.

Family Resettlements.

Hoghton, 15 Beav. 278; *Wright* v. *Vanderplank*, 8 De G. M. & G. 133. In this connexion, it must be borne in mind that the influence and consequent fiduciary position of a father is not deemed to have necessarily determined by the son attaining his majority, but it must be gathered from his age and capacity and other circumstances whether he has in fact been emancipated from parental control: *Rhodes* v. *Bates*, L. R. 1 Ch. 252.

Terms of resettlement must be just and reasonable.

The main test of the validity of a family settlement is whether or not its terms are just and reasonable. The fact that one of the parties obtains for himself incidentally even an undue benefit will not of itself invalidate a settlement satisfying these conditions: *Bellamy* v. *Sabine*, 2 Ph. 425. The considerations which seem to be material in determining whether a resettlement is just and reasonable appear to be, that it is for the general benefit of the family by preserving to it the property and making due provision for younger children, and that the eldest son receives some adequate compensation for being required to cut down his estate tail, which he may bar and convert into a fee simple on coming into possession, into an estate for life. The following terms have been held to be just and reasonable in resettlements:—the provision of a jointure for the eldest son's mother: *Hartopp* v. *Hartopp*, 21 Beav. 259; of portions for his sisters: *Wycherley* v. *Wycherley*, 2 Ed. 175; so provisions may reasonably be made for enabling the father to maintain and educate all his children in a liberal way: see *Tweddell* v. *Tweddell*, Turn. & R. at p. 13; the postponement of the daughters of the eldest son to the sons of his younger brother so that the property might not be severed from a title: *Hartopp* v. *Hartopp*, 21 Beav. 259; and under special circumstances the exoneration by the son of the settled lands from incumbrances: *Hoghton* v. *Hoghton*, 15 Beav. 278, see at p. 318. But a resettlement which deprives younger sons of their estates tail in remainder under the original settlement and gives to the father a power of disposal over the property subject only to the estates in remainder for life and in tail of the eldest son and his issue respectively is

Family Resettlements.

not just and reasonable in its terms: *Heron* v. *Heron*, 2 Atk. 160; *Hoghton* v. *Hoghton*, *supra*; *Dimsdale* v. *Dimsdale*, 3 Drew. at p. 569; *Wallace* v. *Wallace*, 2 Dr. & W. 452. Again, the eldest son ought to receive a proper consideration for reducing his estate tail to a life estate. Such reduction, if properly explained to the son, is reasonable as tending to preserve the inheritance; *Jenner* v. *Jenner*, 2 De G. F. & J. 359. But power ought at all events to be reserved to the son to make a suitable provision, in case of his marriage, for his wife and children: see *Wallace* v. *Wallace*, 2 Dr. & W. at p. 468. But it is submitted that more than this may reasonably be required by the son, and ought in fairness to be granted to him in return for the sacrifice which he is called upon to make. It must be borne in mind that though the son cannot then effectually bar his estate tail under the original settlement without the consent of the protector of the settlement, yet should he survive the latter he will be able effectually so to do and enlarge his estate to one in fee simple, thus placing the lands absolutely at his own disposal; and even during the lifetime of the father the estate tail has a marketable value, and is capable of alienation by way of sale or mortgage, the proceeds of which may make the son entirely independent of his father. Under these circumstances it seems only just and reasonable that a son consenting to a resettlement should have thereby provided for him a fixed annual sum by way of rent-charge, and not be left dependent on a mere allowance by the father which may be arbitrarily or capriciously withheld.

Son should have benefit of professional advice.

In all such cases the son should have the benefit of competent professional advice, and his rights and the law regarding them should be fully and clearly explained to him. Indeed it is to be recommended, especially if the father is intended to receive any advantage which he would not otherwise have possessed by way of personal benefit or control over the property, that an independent solicitor should be employed to advise the son. The absence of such advice was one of the grounds on which the settlement was set aside in *Hoghton* v. *Hoghton*, 15 Beav. 278. But independent advice is not in all cases essential,

Family Resettlements.

provided that it be shown that the matter was fully explained to the son: *Jenner* v. *Jenner*, 2 De G. F. & J. 359; *Bainbrigge* v. *Brown*, 18 Ch. D. 188; *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200.

Of course the mere fact that the settlement has been approved by an independent solicitor will not prevent it from being set aside if its execution has been obtained by undue influence: see *Moxon* v. *Payne*, L. R. 8 Ch. 881.

Delay in impeaching improper resettlement.

Where a family settlement has been acted on for many years, it will not generally be liable to be impeached by the son, even though there may have been original cause for complaint, if he has acquiesced in it after emancipation, especially if third parties have acquired rights under the settlement: see *Bently* v. *Mackay*, 31 Beav. 143; *Dimsdale* v. *Dimsdale*, 3 Drew. at p. 575; *Wright* v. *Vanderplank*, 2 K. & J. 1.

3. Parties and Recitals.

Parties to real settlements.

The remarks made with regard to the necessary parties to personal settlements and the order of their arrangement (see *ante*, p. 251) will generally apply also to settlements of realty on marriage where the property belongs to one of the intended spouses, except that it is usual in such cases that the settlor, whether husband or wife, being the owner of the land, should be the party of the first part, and the other spouse the party of the second part. In family resettlements the tenant for life in possession will be the party of the first part, and the son, or other first tenant in tail in remainder under the original settlement, will be the party of the second part. Having regard to the consideration that the interests of "portionists" are altogether distinct from, and may possibly conflict with the interests of the persons to whom estates in the settled lands are limited, it is usual and generally advisable, though not strictly necessary, in real settlements that there should be two separate sets of trustees, namely, one set of trustees of the portions term, and another set of trustees of the settlement for the purposes of the Settled Land Acts, who will also be trustees of any additional powers expressly given by the settlement.

Parties and Recitals.

Recitals.

If the settlor is absolute owner in fee, free from incumbrances, recitals are often altogether omitted, but it may be advisable to insert a recital to that effect, which after twenty years will by virtue of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 2, become sufficient evidence of such fact: see *Bolton* v. *London School Board*, 7 Ch. D. 766; *Re Marsh and Earl Granville*, 24 Ch. D. 11. Generally, however, such recitals will be introduced as will show the nature and extent of the settlor's title. In a family settlement the original settlement and the disentailing assurance will be recited either at length (as to the former, down to the estate of the first tenant in tail in remainder) or by a short statement of their combined effect. Sometimes the resettlement is expressed to be supplemental to the original settlement and disentailing assurance, but this course has no great advantage over a short recital, either as to brevity or otherwise. If the settlement is made on marriage, and contains recitals as to title, the intended marriage will be recited, and such a recital is frequently inserted even where there are no other recitals.

4. Of Limitations in Real Settlements.

The usual limitations following the conveyance of lands by way of strict settlement will now be considered.

Limitation of uses till marriage.

Uses till Marriage.]—As in the case of personal settlements (*ante*, p. 254) the property will in the case of a settlement of realty on marriage be limited in the first place so as to maintain the existing title until the marriage. The conveyance will be by appointment or otherwise as the nature of the title may require.

Limitation of annuity for pin-money.

Annuities by way of Pin-Money, &c.]—The first limitation, to take effect after the solemnisation of the marriage, in the case of a large estate, is not unfrequently to the use that the intended wife shall during the joint lives of herself and her husband receive out of the rents and profits an annuity of a comparatively small amount for pin-money.

Pin-Money.

Definition of pin-money.

Pin-money may be defined as a provision for the wife's dress, personal ornament, &c., and by way of pocket money. The object of the provision is to enable the wife to supply herself with necessaries, having regard to the husband's station in life, and to defray her current personal expenses without the necessity of constantly applying to her husband for money. Lord *Brougham*, C., in *Howard* v. *Digby*, 2 Cl. & F. 658, expressed an opinion that a husband might withhold payment of pin-money to his wife, if she appeared so dressed, &c., as to misbecome her station. And Lord *Langdale*, M.R., in *Jodrell* v. *Jodrell*, 9 Beav. at p. 54, said that there was annexed to the possession of pin-money the duty of applying it for the wife's own personal dress, decoration, and ornament. But Lord *St. Leonards* states that this duty is one of imperfect obligation; that the wife may recover her pin-money annually or at the times fixed by the settlement; that though she were a miser or a slattern, her husband would have no remedy; and that the husband cannot coerce his wife in the expenditure of her pin-money, or call her to an account for its application: Prop. in H. L. 166.

Savings out of pin-money.

As a consequence of this obligation, however imperfect it may be, it seems, notwithstanding an early decision to the contrary (*Herbert* v. *Herbert*, Pr. Ch. 44), that if pin-money is not expended, savings out of it, being out of moneys given to the wife for a particular purpose, do not form part of her separate estate, but belong to the husband: see *Barrack* v. *M'Culloch*, 3 K. & J. 110.

Arrears of pin-money.

On the same ground if the husband and wife are living together, the wife can only claim one year's arrears from the time of the demand: *Aston* v. *Aston*, 1 Ves. sen. 267; *Townshend* v. *Windham*, 2 Ves. sen. 7; *Peacock* v. *Monk*, ibid. 190; *Thrupp* v. *Harman*, 3 My. & K. 513. But, if the wife is living separate from her husband, the claim for arrears will extend to the whole amount due from the time of the separation: *Aston* v. *Aston*, 1 Ves. sen. 267; *Foss* v. *Foss*, 15 Ir. Ch. R. 215. It has been decided that if a wife die insane, her personal

Pin-Money.

representatives will not be allowed any arrears whatever: *Howard* v. *Digby*, 2 Cl. & F. 634; but see the observations of Lord St. Leonards on this decision, Prop. in H. L. 163.

Pin-money not assignable.

It has been held, in an Irish case, that having regard to the special purposes for which pin-money is given, it is not an interest capable of assignment by the wife, so as to enable her assignee to enforce payment to him from the husband: *Foss* v. *Foss*, 15 Ir. Ch. R. 215.

Effect of wife's misconduct.

If pin-money is secured by an antenuptial settlement, the misconduct of the wife will not prevent her from enforcing payment thereof: *Moore* v. *Moore*, 1 Atk. 272.

Mode of limiting pin-money.

Formerly it was the practice to limit a term to trustees to secure the annuity for pin-money, but it seems clear that a limitation to the use that the wife may receive the annuity is now sufficient for all purposes; she will be entitled to receive and give effectual receipts for it without the intervention of a trustee as her separate property (though separate in a qualified sense having regard to her obligation) by virtue of the Married Women's Property Act, 1882, and she will under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 44, be entitled to all the remedies for money of the rentcharge which were usually inserted in settlements. See *ante*, sub tit. "Annuities," Vol. I., pp. 671 *et seq.* The limitation to her should be expressly made without power of anticipation.

Rentcharges in resettlements preceding the father's life estate.

In the case of resettlements of family properties, other annuities, besides the annuity by way of pin-money for the wife of the tenant for life in possession, will generally take precedence over his life estate. Thus, whether the resettlement is made on the eldest son coming of age or on his marriage the lands will be limited to the use that the son may during the joint lives of himself and his father receive a yearly rentcharge by way of maintenance money pending the coming into possession of the estate; and in the latter case a rentcharge should also be limited to the son's wife if the son should die in the father's lifetime leaving her surviving; a

larger rentcharge by way of jointure is generally created in her favour in a subsequent limitation if the son should pre-decease her after having come into possession of his estate. Pin-Money.

Estates for Life—Impeachment of Waste.]—Subject to the foregoing limitations, the first life estate is commonly given in marriage settlements to the settlor, whether husband or wife. But an exception to this rule is frequently made on the marriage of a woman who is possessed of a large family property where it is desired that the husband should assume and be enabled to support the position, and adequately perform the duties attaching to possession of the property: see Vaizey on Settlements, Vol. II., p. 860. The lands should in this case be charged with an ample annuity in favour of the wife in excess of the amount usually allowed for pin-money. First life estate in marriage settlements of realty.

In a family resettlement, the first life estate will be given to the tenant for life in possession under the original settlement, and after his decease the lands will be limited subject to charges for jointure of his wife and portions for his younger brothers and sisters (as to which, see *post*) to the use of the eldest son for his life. As to resettlements.

Estates for life are usually limited without impeachment of waste, so as to enable the tenant for life for the time being in possession to cut timber, and open mines, &c., and to appropriate the profits to his own use and benefit. Impeachment of waste.

Waste is of three kinds—(i) voluntary; (ii) permissive; (iii) equitable.

(i) Voluntary or actual waste is the destruction or alteration of a material part of the inheritance, *e.g.*, pulling down houses, or displacing fixtures, "digging for gravell, lime, clay, brick, coale, or the like, hidden in the earth, and were not open when the tenant came in, is waste:" Co. Litt. 53 b; but if the mines or quarries have been worked before the commencement of his estate or term, he may continue the working: *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Ca. 454. So, also, cutting Voluntary waste.

Estates for Life—Waste.

down timber, or other trees planted for shelter, or fruit trees, and ploughing up pasture: *ibid.*; and see Com. Dig. *Waste.*

Permissive waste.

(ii) Permissive waste is neglect of repairs, as to which, see *post,* p. 395, note. The Courts will not generally interfere against mere permissive waste: *Wood* v. *Gaynon,* Amb. 395: unless an obligation to repair is imposed by the settlement or lease: *Re Skingley,* 3 Mac. & G. 221; *Woodhouse* v. *Walker,* 5 Q. B. D. 404.

Equitable waste.

(iii) Equitable waste is the misuse by a tenant for life not impeachable for waste, of his powers and privileges, so as, whether through malice, caprice, or extravagance, to cause destruction or spoliation to the inheritance. The leading precedent on this subject is that of *Vane* v. *Lord Barnard,* 2 Vern. 738, where the defendant was restrained from pulling down Raby Castle. Under the head of equitable waste will come pulling down farm houses, and grubbing up woods: *Aston* v. *Aston,* 1 Ves. sen. 265; and cutting down ornamental timber: *Marquis of Downshire* v. *Lady Sandys,* 6 Ves. 107; *Ford* v. *Tynte,* 2 De G. J. & S. 127; *Bubb* v. *Yelverton,* L. R. 10 Eq. 465. See generally as to equitable waste the cases collected in the notes to *Garth* v. *Cotton,* 1 Wh. & Tud., L. C. Eq. 817 *et seq.*

By 36 & 37 Vict. c. 66, s. 25, sub-s. 3, it is enacted that—

> "An estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon a tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

What is timber.

"Oak, ash and elme, these be timber trees in all places:" Co. Litt. 53 a; but other trees may also be regarded as timber by the custom of particular districts, such as beech, hornbeam, whitethorn and blackthorn, and even some fruit trees, such as chesnut and walnut: *Duke of Chandos* v. *Talbot,* 2 P. Wms. 606. No trees, however, are timber till they are of twenty years' growth: *Foster* v. *Lennard,* Cro. Eliz. 1. "As a general rule, pollards would

seem not to be timber: if sound, however, they may be timber by custom:" Dart, V. & P. 4th ed. 122. Estates for Life—Waste.

By the Settled Land Act, 1882 (46 & 47 Vict. c. 38), sect. 35, it is enacted as follows:—

"(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof. Cutting and sale of timber, and part of proceeds to be set aside.

"(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits."

Where the tenant for life, or other limited owner, is an infant, this power may be exercised by the trustees, or, if there are none, an application for the purpose may be made to the Court by the guardian or next friend of the infant to appoint a person to exercise the power: see sect. 60 (1) of this Act. Infant tenant for life.

Where a settlement made in 1856, whereby certain estates were limited to the use of an infant for life subject to impeachment of waste, with remainders over with a trust for the sale of timber and application of the proceeds of such sale as therein mentioned, it was held by *Pearson*, J., that the proceeds of sale of timber were applicable in accordance with sect. 35 of the Act, regard being had to the fact that the infant was impeachable for waste as to timber: *Re Duke of Newcastle's Estates*, 31 W. R. 782; W. N. 1883, p. 99.

A tenant for life impeachable for waste may not (except as empowered by the section above cited) cut timber for sale, except at certain periods, on what is known as a timber estate; in which case the cuttings are treated as part of the annual profits of the estate: *Bagot* v. *Bagot*, 34 Beav. 509; *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656. He may cut underwood in due course: *Pigot* v. *Bullock*, 1 Ves. jun. 479; *Brydges* v. *Stephens*, 6 Madd. 279. But he may not cut trees planted for ornament or protection of banks, nor destroy stools of underwood. And the Settled Land Act, 1882, after authorising the expenditure of capital monies arising under the Tenant for life impeachable for waste may not cut timber generally.

Estates for Life—Waste.

Act in certain improvements specified in sect. 25 (see *post*, pp. 466 *et seq.*), among which "planting" is expressly mentioned, and others of which may involve the planting of trees, enacts as follows:—

Sect. 28 (2). "The tenant for life, or any of his successors as aforesaid (*c*), shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act."

As to trees other than timber.

A tenant for life impeachable for waste may freely cut for sale or otherwise all trees other than timber trees of less than twenty years' growth and other than trees planted for shelter and ornament, or as improvements under this Act: see *Phillipps* v. *Smith*, 14 M. & W. 589. He may, however, cut down timber trees of under twenty years' growth, provided it be for the proper development of the growth of other timber in the same plantation: *Honywood* v. *Honywood*, L. R. 17 Eq. 306.

As to cutting timber for repairs.

A tenant for life may, notwithstanding impeachment for waste, cut and use timber for repairs, but he is not entitled to sell it, and apply the proceeds in paying the expenses of repairs: Co. Litt. 53, 54. And by sect. 29 of the Settled Land Act, 1882 (*post*, p. 474), this right is extended so as to empower tenants for life to cut and use timber, &c., for the construction, repair, and maintenance of "improvements" authorised by the Act.

Test whether a tree is personalty or realty.

A tree severed from the soil is personalty, while attached to the soil it is realty. Whether a tree is so severed or attached as to be personalty or realty, as the case may be, is a question of fact in each particular case: *Re Ainslie*, *Swinburn* v. *Ainslie*, 30 Ch. D. 485; *Llewellin* v. *Williams*, 37 Ch. D. 317.

Right of tenant for life without impeachment of waste to cut timber.

Where a tenant for life is without impeachment of waste, he may cut timber, other than ornamental timber, at his pleasure, and take the proceeds of sale for his own benefit: *Lewis Bowle's Case*, 11 Rep. 79 (6);

(*c*) *I.e.*, "His successors in title having, under the settlement, a limited estate or interest only in the settled land": see sub-sect. (1) of this section.

Estates for Life—Waste.

but his right of property does not accrue until the timber is actually severed from the land. Hence, formerly where trustees under a power sold an estate without the timber, and the tenant for life being without impeachment of waste sold the timber uncut for his own benefit, it was held that the power was not well exercised: *Cholmeley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48; *S. C.*, sub nom. *Cockerell* v. *Cholmeley*, 10 B. & Cr. 564; 3 Russ. 565; 1 Russ. & My. 418; 1 Cl. & F. 60. See also Craig on Trees, 64. But by sect. 13 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), it is enacted that—

Sale under power not to be avoided by reason of mistaken payment to tenant for life, &c.

"Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim, or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest, under the direction of the Court, upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established, and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him."

Proceeds of timber wrongfully cut.

Where timber (*d*) properly so called is cut by a tenant for life impeachable for waste or anybody

(*d*) What is timber depends (1) on general law, and (2) on local custom. By (1) oak, ash, and elm, of twenty years and upwards, are timber, if not so old as to have ceased to consist of a reasonable quantity of usable wood. By (2) beach, hornbeam, and other trees are deemed to be timber in certain localities, see *ante*, p. 388.

The remarks in the text are, of course, with reference to the rights of a tenant for life, independently of his statutory power of cutting timber with the consent of the trustees or under an order of Court, as to which see *post*, p. 478.

Estates for Life—Waste.

else, or blown down by a storm, the proceeds go directly to the owner of the first vested estate of inheritance. Where the cutting is in due course of management and necessary for the estate, the proceeds are invested and the right to the income devolves with the estate: *Waldo* v. *Waldo*, 7 Sim. 261. But the leave of the Court formerly had to be obtained to the cutting in a suit properly constituted, to which the remainderman or owner of the vested estate of inheritance was a party: *Honywood* v. *Hoywood*, L. R. 17 Eq. at p. 311. On the death of such tenant for life, the whole proceeds will become the property of the first tenant for life unimpeachable for waste, or the owner of the first estate in inheritance, whichever estate first comes into possession: *Waldo* v. *Waldo*, 12 Sim. 107; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 75; *Lowndes* v. *Norton*, 6 Ch. D. 139.

Cut in due course of management.

Equitable waste.

A tenant for life, although unimpeachable for waste, and as such competent at law to commit waste, will nevertheless be restrained from committing what is called equitable waste, *i.e.*, the malicious use, or abuse, of the legal right which he possesses; and since the Judicature Act, 1873 (36 & 37 Vict. c. 66), even the legal right to commit equitable waste has gone: see sect. 25, sub-sect. (3); see *ante*, p. 388.

Judicature Act, 1873, s. 25, cl. 3.

Waste restrainable by injunction.

Consequently, a tenant for life unimpeachable for waste will be restrained from cutting ornamental timber, even if planted by the tenant for life himself (*Coffin* v. *Coffin*, Jac. 70 (*e*)), except where such cutting is necessary for the preservation and protection of the remaining ornamental timber, or for the salubrity of the mansion house (*Campbell* v. *Allgood*, 17 Beav. 623), in which case he may take the proceeds. But if the remainderman asks the assistance of the Court the Court will have the

(*e*) But see *Wombwell* v. *Belasyse*, 6 Ves. 2nd ed. 110 a, a later case, where the same Lord Chancellor (*Eldon*) said, that where the trees were planted by the tenant for life without impeachment of waste himself, they would not be entitled to protection unless afterwards left standing with that view by some person having the inheritance.

Estates for Life—Waste.

necessary timber cut under its own supervision: *Baker* v. *Sebright*, 13 Ch. D. 179.

Ornamental timber.

"Ornamental timber" means timber planted, or left standing for ornament of the mansion-house or grounds, and not all timber, the effect of which may be ornamental to the estate: *Marker* v. *Marker*, 9 Hare, 17; *Marquess of Downshire* v. *Lady Sandys*, 6 Ves. 107, 110; *Wombwell* v. *Belasyse*, *ibid.* p. 110 a. And see further, as to the doctrine of equitable waste, *Garth* v. *Cotton*, 1 Wh. & Tud., L. C. Eq., 4th ed., p. 750; and *Baker* v. *Sebright*, *supra*.

Where a mansion-house had been pulled down by the owner in fee of the estate, without any intention of rebuilding it, and he afterwards devised the estate to A. for life, without impeachment of waste, with remainders over, it was held that the tenant for life might cut down the ornamental timber around or about the site of the house: *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504. *Secus*, where it is intended to rebuild it, or to build other houses in place of it: *Wellesley* v. *Wellesley*, 6 Sim. 497; *Morris* v. *Morris*, 15 Sim. 505. "Ornamental timber" will be protected where the mansion-house stands on land, not originally settled but acquired by exchange under the powers of the settlement: see *Ashby* v. *Hincks*, W. N., 1888, p. 63; 58 L. T. (N. S.) 557, where *Stirling*, J., granted an inquiry in the form adopted in *Marker* v. *Marker*, 9 Hare, 17; see Seton on Decrees, 187.

Windfalls.

The produce of timber blown down, in the absence of any improper conduct on the part of the tenant for life, is treated as capital and the income allowed to the tenant for life. Where, however, the tenant for life has acted improperly, *e.g.*, by excessive thinning, the strict rule is to carry the whole produce to capital and allow none to the tenant for life: per *Baggallay*, L. J., *Harrison* v. *Harrison*, 28 Ch. D., at p. 228.

Courts of Equity struggle to prevent accident interfering with the rights of parties, and so where a large number of larch trees (not timber) were blown down by severe storms, and the plantations were so much injured that it became necessary to

Estates for Life—Waste.

clear and replant the ground, it was held that the proceeds of the sale of the larch cut down and felled must be invested and the income paid to the tenant for life; but the Court having regard to the average income which, owing to the nature of the trees, would have been derived from the plantations if no gale had occurred, fixed the annual sum to be paid to the tenant for life out of the income, and if necessary out of the capital of the invested sum, subject to the right of the trustees to have recourse to the fund in order to replant the plantations: *ibid.*

Mines.

A tenant for life unimpeachable for waste may open *new* mines and quarries, and may take the produce arising therefrom for his own benefit. If impeachable, he may continue the working of mines and quarries *already opened;* but he may not open new mines or quarries, or dig pits for gravel, lime, or other minerals; nor does the previous opening of a mine or quarry for a restricted purpose (*e.g.*, for fuel or repair to some particular tenement on the estate), entitle him to work that mine or quarry for commercial profit. When a mine or quarry is open, in the sense of being workable by a tenant for life impeachable for waste, the sinking of a new pit on the same vein, or breaking ground in a new place on the same rock, is not necessarily the opening of a new mine or new quarry: per Lord *Selborne*, L. C., in *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Ca. 454, at p. 466.

Settled Land Act, 1882, ss. 6, 11.

Now, every tenant for life has, by Settled Land Act, 1882, s. 6, power to grant mining leases for any term not exceeding sixty years; and by s. 11 he will be entitled, "if impeachable for waste in respect of minerals," to one-fourth part, or, if unimpeachable, to three-fourth parts of the rent as rents and profits.

Repairs

The legal liability of a tenant for life to execute repairs of the settled property does not appear to be definitely determined.

Statutes of Marlbridge and Gloucester.

Prior to the statutes of Marlbridge (52 Hen. 3) and Gloucester (6 Edw. 1, c. 5), an action for per-

Estates for Life—Waste.

missive (*f*) waste at common law lay only against a tenant by the curtesy, or in dower, or a guardian; but none lay against a tenant for life, or years: Coke 2, Inst. 300. This common law liability was extended by the *former* statute (s. 23) to "fermors" (which term comprehended "all who hold by lease for life or lives, or for years by deed or without deeds:" Coke 2, Inst. 145) making waste (*g*); and by the *latter* the action of waste was extended so as to include "him that holdeth by law of England, or otherwise, for term of life, or for term of years, or a woman in dower;" or against the assignee of a tenant for life or years for waste done after the assignment, and the penalties were increased. See notes to *Greene* v. *Cole*, 2 Saund. 252.

Legal tenant for life.

But notwithstanding these statutes the legal liability is very doubtful: per Lord *Cranworth*, L. C., *Powys* v. *Blagrave*, 4 De G. M. & G. at p. 458, referring to *Gibson* v. *Wells*, 1 N. R. 291; *Herne* v. *Benbow*, 4 Taunt. 764. And see *Jones* v. *Hill*, 7 Taunt. 392; *Harnett* v. *Maitland*, 16 M. & W. 257; *Lord Lansdowne* v. *Lady Lansdowne*, 1 J. & W. 523; *Woodhouse* v. *Walker*, 5 Q. B. D. 404—407.

But, in *Yellowly* v. *Gower*, 11 Exch. 274, the Court held, notwithstanding the doubt attributable to *Gibson* v. *Wells*, *Herne* v. *Benbow*, and *Jones* v. *Hill*, that there was no doubt as to the liability of tenants for term of years, for they are clearly put on the same footing as tenants for life both as to voluntary or permissive waste: 1 Co.

(*f*) *I.e.*, waste by reason of omission or not doing, as for want of reparation, "for he that suffereth a house to decay which he ought to repair doth the waste": Co. 2 Inst. 145.

The Act enacted: "Also fermors, during their terms, shall not make waste, sale, nor exile of house woods, men, nor of anything belonging to the tenements that they have to ferm without special licence had by writing of covenant making mention that they may do it" subject to certain penalties, which were increased by 6 Edw. 1, c. 5.

(*g*) And according to Co. 2 Inst. 145: "the words 'make waste' in legal understanding in this place" (*i.e.*, the statute of Marlbridge) "as well as in the statute of Gloucester include as well *permissive* waste. . . . as waste by *reason of commission* as to cut down timber, trees, or prostrate houses and the like."

Estates for Life—Waste.

Inst. 53; *Harnett* v. *Maitland*, 16 M. & W. 257; and see *Davies* v. *Davies*, 38 Ch. D. 499.

Equitable tenant for life.

But it is clear that no liability to execute repairs is thrown upon an equitable tenant for life. Equity has always declined to interfere against mere permissive waste: per Lord *Cranworth*, *Powys* v. *Blagrave*, 4 De G. M. & G. at p. 458, referring to *Lord Castlemain* v. *Lord Craven*, 22 Vin. Abr. 523, tit. Waste, pl. 11. "The tenant for life is equitable tenant for life; and the remainderman is not entitled to throw upon her the burthen of keeping the property in repair," per *Lindley*, L.J., in *Re Hotchkys*, *Freke* v. *Calmady*, 32 Ch. D. at p. 420.

Duty and liability of trustee—permissive waste.

In *Powys* v. *Blagrave*, Kay 495, Lord *Hatherley* (then V.-C. *Wood*), held that a trustee in whom the legal estate was vested, was not liable for permissive waste by the equitable tenant for life, and could not interfere with the possession of the tenant for life (*h*). But where the estate is vested in trustees during a life tenancy, but no powers of management or of repairing are given to them, it would be advisable, if not actually necessary, for the trustees to apply to the Court for authority to execute such repairs as are shown to be judicious, and the Court will then, if it think it a proper case, give directions as to the raising of the necessary money for that purpose whether by sale or mortgage or in some other way which shall be equitable as between tenant for life and remainderman: see *Freke* v. *Calmady*, 32 Ch. D. 408; see also *Re Jackson*, *Jackson* v. *Talbot*, 21 Ch. D. 706; *Re Household*, 27 Ch. D. 553; *Conway* v. *Fenton*, 40 Ch. D. 512.

Application to Court for authority to execute necessary repairs.

Express obligation on tenant for life.

Where, however, the tenant for life has an express duty or obligation to repair, imposed upon him by the instrument creating the estate, the Court will hold him liable even for permissive waste: *Re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates*, 23 Beav. 33; *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Re Williames*, *Andrew* v. *Williames*, 52 L. T. (N. S.) 41. As to the liability of the executors of the deceased tenant for life so liable, see 3 & 4 W. 4, c. 42, s. 2, and the two last cases.

(*h*) But *semble*, he may in a case of active waste.

Estates for Life—Waste.

By sect. 29 of the Settled Land Act, 1882, it is enacted that:—

Protection as regards waste in execution and repair of improvements.

(1.) "The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, shall during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe."

It is to be observed that the obligation to maintain, etc., imposed by this enactment is confined to "improvements" effected with capital monies arising under this Act, and does not extend to repairs generally.

Insurance.

In the absence of special contract, or obligation, a tenant for life is not bound to rebuild in case of fire, and by parity of reasoning is not bound to insure, and if he does insure he is in nowise bound to lay out the insurance money in rebuilding: *Warwicker* v. *Bretnall*, 23 Ch. D. 188.

Repairs by tenant for life. No charge on inheritance.

Where a tenant for life has voluntarily effected repairs or permanent improvements on the estate, the expenses of so doing are never allowed to be charged upon the inheritance: *Floyer* v. *Bankes*, L. R. 8 Eq. 115; *Re Leigh's Estate*, L. R. 6 Ch. 887; *Drake* v. *Trefusis*, L. R. 10 Ch. 364; except when the permanent improvements have put new buildings on the estate: *ibid.*, at p. 367.

Inquiry as to expenditure.

But the Court has sometimes directed an inquiry whether the money expended by the tenant for life in works upon the estate was beneficial to the inheritance, *e.g.*, the completion of a mansion-house on the estate left unfinished by the settlor or testator, or payments necessary to preserve part of the estate from forfeiture: *Hibbert* v. *Cooke*, 1 S. & S. 552; *Dent* v. *Dent*, 30 Beav. 363 (*i*); and if the

(*i*) The tenant for life in this case was held entitled to no allowance, nor even an inquiry, for sums expended, (1) in erecting a conservatory and vinery; (2) rebuilding a farm-house and buildings; (3) erecting cottages, permanent furnaces, works, and cottages at some copper-works part of the estate; (4) draining marshy ground.

Estates for Life—Waste.

inquiry were answered in the affirmative, the expenses could be charged. In *Re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 756, where an infant was absolutely entitled (subject to certain trusts not exhausting the whole beneficial value) to the beneficial interest in real estate : *Kay*, J., directed an inquiry whether any and what repairs were necessary to be done. But such a jurisdiction should be jealously exercised and only in cases amounting to actual salvage : *ibid.*

Liability of equitable tenant for life of leaseholds.

An equitable tenant for life of leaseholds is not liable on the covenants to the landlord, and is not bound to put the premises in repair, so as to prevent the forfeiture of the lease, *Re Courtier, Coles* v. *Courtier*, 34 Ch. D. 136 (*k*).

The Trustee Act, 1888 (51 & 52 Vict. c. 59), now authorises trustees at their discretion to insure the trust property against loss or damage by fire :—

Trustee may insure buildings.

"7.—(1.) It shall be lawful for, but not obligatory upon, a trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof, or out of the income of any other property, subject to the same trusts, *without* obtaining the consent of any person who may be entitled wholly or partly to such income.

"(2.) This section shall not apply to any building or property, which a trustee is bound forthwith to convey absolutely to any *cestui que trust* upon being requested so to do."

Limitations to trustees to preserve.

Limitations to Trustees to preserve Contingent Remainders.]—The limitation to trustees during the life of the tenant for life and immediately following that estate, to support the contingent remainders in the event of the particular estate of freehold determining by forfeiture, surrender, or merger, before the contingent remainders were ready to vest, is now in reliance on statutory enactments generally omitted.

Not generally necessary.

In the case of an ordinary settlement of real estate, where the limitation of the life estate to the parent or

(*k*) See as to duty of trustees, *post.* See *Re Fowler, Fowler* v *Odell*, 16 Ch. D. 723, as explained by *Coles* v. *Courtier.*

parents (persons *in esse*) is immediately followed by successive limitations in tail to the children, each of which vests in possession on the determination of the immediately preceding estate, limitations to preserve contingent remainders are altogether unnecessary.

Trustees to Preserve Contingent Remainders.

The Act to amend the Law of Real Property, 8 & 9 Vict. c. 106, by s. 1 repeals so much of the earlier Act 7 & 8 Vict. c. 76 as abolished contingent remainders, and enacted by s. 8 that a contingent remainder existing at any time after the 31st Dec., 1844, should be, and if created before that time should be deemed to have been, capable of taking effect notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold in the same manner in all respects as if such determination had not happened.

But a contingent remainder, notwithstanding the statute, remained liable to be defeated unless it vested or became an actual estate during the continuance of the particular estate which supported it, or immediately upon the determination of that estate by effluxion of time, or the happening of some event on which it was in its creation limited to determine: *Festing* v. *Allen*, 12 M. & W. 279; *Price* v. *Hall*, L. R. 5 Eq. 399; *Perceval* v. *Perceval*, L. R. 9 Eq. 386.

A later statute (40 and 41 Vict. c. 33), an Act to amend the law as to contingent remainders, enacted that:—

Act to amend the law as to contingent remainders.

"Every contingent remainder, created by any instrument executed after the passing of this Act (August 2nd, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

A legal (*l*) limitation of lands to A. for life, and

(*l*) These feudal rules had no application to equitable estates which were governed by different rules: *Re Finch, Abbiss* v. *Burney*, 17 Ch. D. 211, and such a limitation as in the text, if created by

Trustees to Preserve Contingent Remainders.

after his death to such son of A. as shall first attain twenty-four, created a good contingent remainder, and if at the death of A. a son of his was living who had attained twenty-four, that son would at once take the feudal possession by reason of his estate in remainder which vested in him *ex hypothesi* on attaining twenty-four, *i.e.*, during the continuance or immediately on the determination of his father's preceding freehold estate. But if A. had no son living at his death, or no son who had attained twenty-four, the remainder would fail, and the same result would happen in the case of a legal limitation to A. for life, and after his death to the son of B., if at A.'s death B. had no son. So if a remainder is limited to such children of A. as shall attain a specified age, and, on A.'s death, some only of the children have attained that age, such children alone will take: *Holmes* v. *Prescott*, 10 Jur. (N. S.) 507; *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; *secus*, where the gift can take effect as an executory devise; *Re Lachmere and Lloyd*, 18 Ch. D. 524; *Miles* v. *Jarvis*, 24 Ch. D. 633. Again, the particular estate may also be originally limited to determine on other events besides the death of the holder of the particular estate, *e.g.* by a shifting clause divesting that estate in the event of his becoming entitled to other estates, or to a title, or failing to comply with the conditions of a name and arms clause, or with some other condition; and if immediately on such determination the estate in remainder is not ready to vest, the contingent remainder will still fail. In these cases, notwithstanding the statutory alterations it would seem safer to insert a limitation to trustees to preserve: see Vaizey on Settlements, 1165.

Old rule.

According to the old rule of law, "if such a construction could be put upon a limitation as it might take effect by way of remainder, it should never take place as a springing use or executory devise," per Lord Keeper *Henley: Carwardine* v. *Carwardine*, 1 Ed. Ch. Ca. 27; Fea. C. R., 9th Ed. 388 *et seq.*, 392; *Goodtitle* v. *Billington*, Dougl. Rep. 725; that is to

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way of springing use, or executory devise, would be void for remoteness.

Trustees to Preserve Contingent Remainders.

say, where a contingent estate is limited to depend upon a freehold capable of supporting it: Fea. C. R. 386. "But where a future interest without a preceding estate, or a contingent interest unsupported by any preceding freehold, or any estate after a preceding vested fee simple, is limited by devise; such limitation, as it cannot be good as a remainder, may take effect as an executory devise, provided it falls within the limits which the law prescribes for the validity of such executory estates," Fea. C. R. 395, *i.e.*, a life in being and twenty-one years after.

The late Act saves only such contingent remainders as would have been valid if originally created by way of springing or shifting use or executory devise, so that a remainder which if so created would have been void as infringing the rule against perpetuities, will not be saved: Williams on Seisin, 205, and App. B.

Where advisable still to introduce the clause.

The result seems to be that it is no longer necessary to insert a limitation to trustees to preserve when the gift in remainder is to an individual; but if it be to a class subject to a contingency which may continue after the natural determination, or where, though the contingency cannot so continue, the particular estate is liable to premature determination by means of a shifting clause, it appears the safe and proper course in the present state of the law to insert the limitation.

Limitation of jointure rentcharge.

Jointure Rentcharge.]—Subject to the first life estate, the property (if a husband is the settlor) is limited to the use that the wife may receive thereout a yearly rentcharge by way of jointure for her life, a

Restraint on anticipation.

restraint on anticipation during the coverture should for the reasons before mentioned (*ante*, p. 295) be imposed.

Bar of dower.

It used formerly to be expressly provided that the jointure was to be "in bar of dower"—such a statement being one of the necessary conditions to constitute a valid legal jointure within the Statute of Uses (27 Hen. 8, c. 10), so as to operate as a bar to dower: see *Lewis Bowles' Case*, Tud. L. C. Conv. 2nd Ed. pp. 63 *et seq.* Now that a husband can

Jointures.

by deed or will dispose of his property, and bar his wife's right of dower, it seems to be no longer necessary to make such express provision: see Wolst. & Turn. S. L. Acts, 83; but it is very usually retained in practice.

Apportionment of jointure.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), makes the jointure apportionable, although it is directed to be paid on specified days.

Payment of rentcharge without deduction.

The jointure is generally directed to be paid "free from all deductions," or "without any deduction" except succession duty. This exception may be omitted when the husband is the settlor and the wife takes as his immediate successor, for no duty will be payable (16 & 17 Vict. c. 51, s. 18). But where the husband is not the immediate predecessor, it will still be necessary expressly to except the duty where such is the intention.

Where on the marriage of his daughter, a father by the marriage settlement contracted either during his life or within six months after his death, to pay to the trustee of the settlement a sum of £1000, "free from all deductions whatsoever," the Court of Appeal held that succession duty (if any was payable) was payable by the trustees of the settlement, and that the covenant did not render the covenantors' executors liable to pay it: *Re Higgins, Day* v. *Turnell*, 31 Ch. D. 142.

The words "free from all deductions," "without any deduction," or a "clear rentcharge" would discharge the jointure from liability for succession duty, but not from income tax: *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Sadler* v. *Rickards*, 4 K. & J. 302; *Gleadow* v. *Leetham*, 22 Ch. D. 269; and see *Peareth* v. *Marriott*, 22 Ch. D. at p. 192; unless the word "taxes" has been coupled with "deductions" or some other indication is given that the deduction was intended to include income tax: *Festing* v. *Taylor*, 3 B. & S. 217; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 62; *Re Bannerman's Estate*, 21 Ch. D. 105.

Release from jointure.

By the 22 & 23 Vict. c. 35, s. 10, the wife will be enabled to release from her jointure part of the property charged with it, without giving up her

right to enforce its payment from the part remaining unreleased. This section enacts as follows : Jointures.

"The release from a rentcharge of part of the hereditaments charged therewith shall not extinguish the whole rentcharge but shall operate only to bar the right to recover any part of the rentcharge out of the hereditaments released, without prejudice nevertheless to the rights of all parties interested in the hereditaments remaining unreleased, and not concurring in or confirming the release." Release of part of lands charged not to be an extinguishment.

The effect of this section is to overrule the old law by which a release of part of the land from the annuity charged upon the whole land put an end to the whole annuity; but while the annuity is thus kept alive for the benefit of the annuitant, the proviso at the close of the section protects the rights of the persons interested in the unreleased portion of the land. If part of the land charged is released from the jointure, and the persons interested in the rest of the land concur in such release, the whole jointure will be payable solely out of the *unreleased* part; when they do not, then the jointure will be apportioned, and out of that unreleased part will be payable only such proportion of the jointure as the unreleased bears to the released portion of the land: *Booth* v. *Smith*, 14 Q. B. D. 318. Effect of Act.

Limitation of Portions Term.—Subject to the rentcharge the estates are limited to the use of the trustees (of the portions term, if distinct from the trustees of the powers) for a long term of years without impeachment of waste. This enables them to convey their interest unimpeachable of waste to an assignee of the term, who may freely avail himself of such interest, but the trustees themselves are bound to a provident exercise of their powers, and will not generally be allowed to cut timber, &c. notwithstanding that their interest is without impeachment of waste: *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. at p. 115; *Beaumont* v. *Marquis of Salisbury*, 19 Beav. 198. As a general rule the declaration of the trusts of the term is postponed to Portions.

Portions.

the limitation of the successive estates down to the ultimate estate in fee, but some points with reference to the trusts of the term may conveniently be noticed here. The portions are almost invariably directed to be raised after the death of the husband, or other tenant for life, or during his life, if he consent; and the amount to be raised is either a fixed sum, or varies in proportion to the number of the younger children.

When portions to be raised.

Younger children.

The children to take are the children other than an eldest or only son, or the son who by virtue of the limitations of the settlement should be or became entitled to the first estate of inheritance in the hereditaments thereby settled, or in other hereditaments under the limitations of some other instrument referred to in the settlement. "Every child except the heir is considered in Equity as a younger; and eldership not carrying the estate along with it is considered not such an eldership as shall exclude by virtue of such clauses:" per Ld. *Hardwicke*, C., in *Duke* v. *Doidge*, 2 Ves. sen. 203, n.

Meaning of eldership.

When the eldest or only son is to be ascertained.

The time for ascertaining what son answers the description of an eldest or only son, etc., and is consequently excluded is, in the absence of direction, the period fixed for the raising and distribution, and not the vesting of the portions: *Chadwick* v. *Dolman*, 2 Vern. 528; *Lord Teynham* v. *Webb*, 2 Ves. sen. 198; *Matthews* v. *Paul*, 3 Swanst. 328; *Collingwood* v. *Stanhope*, L. R. 4 H. L. at p. 53.

Principle of cases under marriage settlements is equality for children.

The principle of the cases on marriage settlements, from the time of *Duke* v. *Doidge* and *Chadwick* v. *Dolman* (*supra*) downward, is that the Court with regard to all questions arising on provisions for children under a marriage settlement holds that the principal intent to be imputed to the parties (unless such an intent is contrary to the express terms of the settlement) is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded: per Ld. *Hatherley* in *Collingwood* v. *Stanhope*, L. R. 4 H. L. at p. 52. Consequently, if under such a settlement the first born son does not take the family estate, but it passes to a younger son, the Court regards as the elder son, not

Eldest born not always "eldest son."

Possession of family estate.

Portions.

the elder born, but the younger brother who is in possession of the family estate, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children; and if a younger child has had a portion assigned to him, but at the time *of distribution* is the elder child, then the portion which has been assigned to him is no longer his, but will be included in the fund in which the rest of the children are entitled to share to his exclusion: *ibid.* at p. 53. Thus where an eldest son, first tenant in tail in remainder, has died without issue before obtaining possession, and before the time of distribution, his estate has been held entitled to a portion: *Ellison* v. *Thomas*, 1 De G. J. & S. 18.

Death of eldest son without issue before obtaining possession.

On the other hand, when the eldest son has disposed of the estate (*e.g.*, by a relimitation of the estate under a power contained in the deed disentailing the estate although he has cut down his estate tail to a life estate) and has died before the time of payment of the portions, the younger son having become the eldest, but losing the estate, is not disentitled to a portion, but the eldest son is, because he has really had the disposal of the estate: see per *Kay*, J., in *Reid* v. *Hoare*, 26 Ch. D. 368 (summarising the effect of *Peacocke* v. *Pares*, 2 Keen, 689; *Spencer* v. *Spencer*, 8 Sim. 87; *Macoubrey* v. *Jones*, 2 K. & J. 684; and *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43).

Disposal of estate by eldest son.

In *Reid* v. *Hoare* (*supra*), a younger son became by the death of his elder brother before the period of distribution an elder son, but the settled estates had before that date been sold under a paramount title, and realized only 2400*l.*, whereas the amount fixed for portions was 5000*l.* When the period of distribution arrived, he claimed to share in the 5000*l.* on the ground that the estate no longer existed, and that owing to the excess of the portions over the proceeds of sale, he would receive nothing unless entitled to share in the portions; but *Kay*, J., held that the question must be considered as if the estates were still remaining unsold, but were worth only 2,400*l.*, that the 5000*l.* was the first charge on the estates, and that the right of the portionists to

Portions to be treated as first charge.

Portions.

receive their portions out of the estate in priority to any benefits to be derived from the possession of the estate by the person entitled thereto had never been questioned, and that whether the value of the estate subject to the portions was greater or less than the portions—or even (as here) nothing at all—the son who had become "the elder" had no claim to any share in the primary charge. But where the exclusion is not with reference to an estate limited by or referred to in the settlement, or where the settlor is not a parent or *in loco parentis*, the term "eldest son" *primâ facie* means a particular person and not a series of persons, and such person must in the absence of any express direction to the contrary be ascertained at the time of vesting: *Hall* v. *Hewer*, Amb. 203. So if a fund be given in trust for A. for life, and after his death for child or children of A. "except an eldest or only son" if more than one who shall attain twenty-one or marry, if, at the time of vesting (*i.e.* when the eldest of the younger children attains twenty-one), there is in existence an eldest son, he alone will be excluded, and thereupon the clause of exclusion will cease to operate, and a younger son who afterwards becomes, and is at the period of distribution the eldest son, will be entitled to share in the fund: *Re Theed's Settlement*, 3 K. & J. 375; *Sandeman* v. *Mackenzie*, 1 J. & H. 613, 628; *Adams* v. *Adams*, 25 Beav. 652; *Domvile* v. *Winnington*, 26 Ch. D. 382. In the last-named case *Kay*, J., refers apparently with disapproval to *Matthews* v. *Paul*, 3 Swanst. 328, where Sir Thomas *Plumer*, M.R., had held that under a gift such as that now under discussion, the time for ascertaining the "eldest son" was the period of distribution (*m*).

When "eldest son" literally construed.

Shifting clauses as distinguished from exclusion clauses.

A distinction must also be drawn between clauses of exclusion of the eldest son entitled to the estate, and shifting clauses, which are applied in a settlement for the purpose of determining the existing uses of an estate and creating new and different

(*m*) The reasoning of this case is also questioned, Jarman on Wills, 4th ed., Vol. 2, pp. 210, 211.

Portions.

uses. These latter clauses operate under the Statute of Uses, and according to a cardinal principle of the law of uses, no use will be held to arise unless the conditions and terms on which it is to come into being are strictly followed: per Lord *Westbury* in *Collingwood* v. *Stanhope*, L. R. 4 H. L. at p. 57; and see *Bathurst* v. *Errington*, 2 App. Ca. 698.

Time of vesting of portions.

It is advisable expressly to fix the time at which the portions are to vest. According to the rule laid down by a long course of decisions there is in the construction of a settlement a presumption or an implication that the settlor intends that according to ordinary practice these portions should vest at the time when they are held to be needed, *i.e.* at twenty-one in the case of males, and in the case of females at that age or marriage: *Emperor* v. *Rolfe*, 1 Ves. sen. 208; *Howgrave* v. *Cartier*, 3 Ves. & B. 79; *Perfect* v. *Curzon*, 5 Madd. 442, 444; *Swallow* v. *Binns*, 1 K. & J. 417, 425; and see *Wakefield* v. *Maffet*, 10 App. Ca. 422, 435. In *Howgrave* v. *Cartier*, Sir William *Grant*, M.R. (p. 85), said: "If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition (*n*). If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision; usually as to sons at the age of twenty-one, and as to daughters at that age or marriage."

Where raising of fund is contingent.

Again a distinction must be made between cases where the fund fixed for portions is to arise in any event and the question is as to its mode of distribu-

(*n*) See *Jeyes* v. *Savage*, L. R. 10 Ch. 555; *Re Willmott's Trusts*, L. R. 7 Eq. 532, where there was a distinct provision for the issue of any child dying in the lifetime of the tenant for life.

Portions.

tion—and those where "the fund itself does not become raiseable except on a contingency" (*e.g.*, the event of the children surviving their parents), in which case, "however strong may be the expressions in the subsequent limitation of the fund to be raised, they will not overcome the original difficulty of there being no fund to dispose of except in a certain contingency": per *Wood*, V.-C., in *Swallow* v. *Binns*, *supra*, at p. 426, referring to *Hotchkin* v. *Humfrey*, 2 Madd. 65, and *Fitzgerald* v. *Field*, 1 Russ. 430.

Appointment of portions whether fraud on power where appointees have died under twenty-one or marriage.

In some cases a question has arisen whether an appointment of portions under a power in the settlement in favour of infants, and which are directed to vest immediately, was not a fraud upon the power, in the event of the appointees not living to want them (*o*).

It is now decided that if no time is fixed by the settlement itself for vesting, an appointment by the donee of the power to the full extent of the power in favour of infants, and made to vest immediately, will, if authorised by the terms of the power, and in the absence of any fraudulent intention on the part of the donee of the power, be upheld, and the portions will be raiseable although by the death of one or more of the children under age the appointor becomes himself entitled to the portion or portions: *Henty* v. *Wrey*, 21 Ch. D. 332.

In that case *Lindley*, L.J., at p. 359, sums up the results of the various authorities with reference to the question of the vesting and raising of portions, when as a fact the portionists have died before they want them, *i.e.*, twenty-one or marriage:—

Rules to be followed as to vesting and raising portions.

(1.) "That powers to appoint portions charged on land ought, if their language is *doubtful*, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry; (2.) That where the language of the power is *clear and unambiguous* effect must be

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(*o*) See as to frauds on powers, *ante*, sub tit. "APPOINTMENTS," Vol. I., pp. 765 *et seq.*

Portions.

given to it; (3.) That where, upon the true construction of the power and the appointment, the portion *has not vested* in the lifetime of the appointee, the portion is not raiseable but sinks into the inheritance (*Lady Poulet* v. *Lord Poulet*, 1 Vern. 204); (4.) That where, upon the true construction of both instruments, the portion *has vested* in the appointee, the portion is raiseable even although the appointee dies under twenty-one or (if a daughter) unmarried (*Lord Rivers* v. *Earl Derby*, 2 Vern. 72); (5.) That appointments vesting portions charged on land in children of tender years, who die soon afterwards, are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so."

Accordingly, it is in the forms in the precedents expressly directed that the portions shall vest as to sons at twenty-one, and as to daughters at that age or marriage, and this is followed by a direction that the portions are not to be payable until after the death of the tenants for life unless with their consent.

Advisable to express time when the character of "elder son" and "younger children" to be ascertained.

It is also advisable to express clearly the time at which the character of the elder son and younger children is to be ascertained, and it is now generally recognised that the most convenient course and the one which will in general meet the intention of the parties is to make once for all the son who at the age of twenty-one years is the eldest son, the son to be excluded although by death without issue and without having disentailed before the period of distribution, he may not obtain the possession or enjoyment of the estate, and the portions being indefeasibly vested at twenty-one to make a younger son, who after attaining that age may ultimately succeed to the estate, entitled nevertheless to share in the portions. The advantage of this course is that a second son having attained twenty-one will be able, if he desire to marry, to make a settlement which will be good notwithstanding the death of his elder brother in the lifetime of the tenant for life,

Portions.

while the risk that by the death of the eldest son after attaining twenty-one, in the lifetime of the tenant for life, that son's wife and daughters may be unprovided for, would, as a general rule, be obviated by the son, with the concurrence of the protector of the settlement (who will generally be the father), barring the entail on the occasion of his marriage and by a resettlement of the estates making provision for his wife and daughters.

Mode of raising portions.

The portions are, as a rule, directed to be raised, either by mortgage or sale or demise of the premises comprised in the term or of any part thereof, *or* out of the rents and profits, *or* by the sale of timber or minerals, *or* by all or any of those means, *or* by any other reasonable means. The presumed intention of the settlor is that the settled estates shall, in the first instance, be subject to certain charges in favour of the persons to whom they are given, and subject thereto shall go to the persons to whom the estates are limited in succession. All the provisions in the settlement relating to the manner of raising the charges is mere machinery for carrying out those intentions: per *Wigram*, V.-C., in *Marker* v. *Kekewich*, 8 Hare, 299.

Incidence of charge not affected by trustee's discretion.

The trustees have thus a discretion as to which of several alternative plans they will adopt. But the existence of this discretion will not be allowed to alter the rights of the parties entitled to the enjoyment of the estate in succession, or permanently to settle the incidence of the charge; and it by no means follows that because the trustees have exercised that discretion honestly, the charge will be left to be finally borne by those parties upon whom the act of the trustees might leave it: *Marker* v. *Kekewich*, 8 Hare, 291; *Jones* v. *Jones*, 5 Hare, 440; *Re Marquis of Bute*, *Marquis of Bute* v. *Ryder*, 27 Ch. D. at p. 218.

Statement of rule.

The rule is thus laid down in Jarman on Wills, 4th Ed., Vol. II., p. 615: "Where the direction is to raise out of the rents and profits, or by sale or mortgage, it is obvious that these words (being evidently used in contradistinction) cannot mean the same thing; rents and profits, therefore, must mean

Portions.

annual rents and profits; and if in such a case the charges to be raised by these respective modes are of two kinds, one annual and the other in gross, the words will be distributed, the annual charges being raiseable out of the annual rents, and the sums in gross by sale or mortgage."

Where, therefore, for the purposes of convenience the portions have been raised primarily out of property to the prejudice of the tenant for life (*e.g.* the rents and profits, including timber which the tenant for life, being unimpeachable for waste, could cut, or accumulations of income), the tenant for life is entitled to an adjustment of accounts, and to have the sums raised charged upon the corpus of the estate.

In the case of *Balfour* v. *Cooper*, 23 Ch. D. 472, where the trust of a portions term was "by mortgaging or otherwise disposing of the lands comprised in the term, or out of the rents and profits thereof or by any other means" to raise certain portions, it was held that the portionists' strict right was to have the rents and profits applied by the receiver (who had been appointed in the action) (1) in payment of the interest, and (2) in reduction of the capital. There it was assumed by the Court that, under the particular circumstances of the case, no mortgage could be effected.

Settled Land Act, 1882, s. 20.

It may be here observed that where no money has been actually raised under a portions term, a conveyance by the person who is tenant for life, or a person having the powers of tenant for life, under the settlement by which the term is limited of the land or part of the land comprised in the term will discharge the land conveyed from the charge of portions, which will be transferred to the proceeds of sale: Settled Land Act, 1882, sect. 20.

Judicature Act, 1873, s. 34.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (cl. 3), all causes and matters for the raising of portions or other charges of land are assigned to the Chancery Division of the High Court.

Interest.

The settlement should also state expressly whether or no interest is to be paid to the portionists, and if

Portions.

so at what rate and from what time. In the absence of direction a portion, like any other sum of money charged on land, carries interest from the time at which the portion ought to have been raised and not from the time of the vesting: *Evelyn* v. *Evelyn*, 2 P. Wms. 669. The donee of a *power* to charge and to direct whether if at all, and, if so, to what extent the charge shall be raised, has a right to fix the rate of interest: *Boycot* v. *Cotton*, 1 Atk. 552; *Lewis* v. *Freke*, 2 Ves. jun. 507; but where there is an absolute *trust* to raise a specified sum, the donee of a power of apportioning and fixing the time for the distribution of that sum has no such right: *Balfour* v. *Cooper*, 23 Ch. D. 472.

Rate of interest.

The rate to be allowed, in the absence of any direction in the settlement, is, in respect of portions charged upon English estates, 4 per cent., and upon Irish estates 5 per cent. In the case of *Young* v. *Lord Waterpark*, 13 Sim. 199, the interest charged was 4 per cent., although, some of the land charged was in Ireland. But that decision (if correct) must be based on this, that there was a single sum of 10,000*l.* directed to be raised under a single term of —— years out of *both English and Irish estates*, no part of the sum being charged particularly either upon the English or Irish estates, and it would have been almost impossible for the English Court which was dealing with the property to fix a different rate of interest according as part was raised out of English and part out of Irish land. It was argued that the *lex fori* would be the governing law, but the rights of the portionists to interest cannot depend upon whether the proceedings in relation to the raising of the portions take place in England or Ireland: per *Lindley*, L.J., in *Balfour* v. *Cooper*, 23 Ch. D. 481.

Lex fori.

When portions to be raised, question of construction of trust for raising.

It is now recognised as the rule of the Court (*Hebblethwaite* v. *Cartwright*, Cas. Temp. Talbot, 31; *Brome* v. *Berkley*, 2 P. W. at p. 488; *Codrington* v. *Lord Foley*, 6 Ves. 364; *Smyth* v. *Foley*, 3 Y. & C. Ex. 142), that the question of the period at which the portions are to be raised must depend in each case upon the "penning of the trust" for raising

Portions.

them, and the intention as shewn upon a face construction of the whole instrument.

General rule.

In the absence of any express direction, the general rule derived from the presumed intention of the settlor, is unless that presumed intention is negatived, that when the trust of the term is to raise a portion payable (1) at a fixed date, or (2) no date being fixed, upon a certain contingency, or (3) when the date and also the class of portionists depends on a contingency; then (1) at the fixed date, or (2 & 3) on the happening of the contingency, the portions are raiseable immediately, and the term is saleable notwithstanding that it be reversionary: see *Smyth* v. *Foley*, 3 Y. & C. Ex. 142.

Suspension of portions.

A power contained in the portions term for the father with the consent of the trustees to revoke all the uses suspends and prevents the payment of the portions: *Reresby* v. *Newland*, 2 P. Wms. 101.

Whether whole sum for portions raiseable when one raiseable.

The question whether, in the absence of an express direction in the settlement, the whole amount of the portions is raiseable as soon as one of them can be required to be raised does not seem to be clearly settled. In *Sheppard* v. *Wilson*, 4 Hare, 392, a petition presented by the eldest son, the owner of the estate, asking to have the portions raised and invested and the estate discharged was refused, *Wigram*, V.-C., saying, that the Court would not anticipate the time of payment in raising the money, or give the children an inferior security for their portions: see *Wynter* v. *Bold*, 1 S. & St. 507; *Dickinson* v. *Dickinson*, 3 Br. C. C. 19.

But in the earlier case of *Gillibrand* v. *Goold*, 5 Sim. 149, where four of the younger children having attained twenty-one (three others being infants), filed a bill to have the portions raised, *Shadwell*, V.-C., held that as the sum 10,000*l.* for portions had become raiseable, and having regard to a clause prohibiting a mortgage until some one of the portions should have become payable, the whole 10,000*l.* must be raised at once. The objection that was raised in all the cases was that the infants were entitled to the security of the estate charged and ought not to be exposed to the fluctuation in the value of securities and

Portions.

the risk of losing their property, but that objection does not at the present day, having regard to the depreciation in the value of land, appear so formidable. A similar order was made by Sir *E. Sugden*, C., in *Leech* v. *Leech*, 2 Dr. & W. 568: see also the observations of Lord *Hatherley*, C., in *Otway-Cave* v. *Otway*, L. R. 2 Eq. 725.

Costs of raising portions.

The costs of raising portions are thrown on the estate subject to the charge: *Michell* v. *Michell*, 4 Beav. 549. Trustees who have power to raise a certain sum by mortgage for the benefit of a particular person or class of persons have by implication power to raise the incidental costs by mortgage of the same property: *Armstrong* v. *Armstrong*, L. R. 18 Eq. 541.

Suggested authority to trustees.

It seems unreasonable that the estate should be burdened with the costs of as many separate mortgages as there are younger children, and consequently the trustees may not inconveniently or improperly be authorised so soon, at all events, as the outside amount of the sum required for portions is ascertained, at the request of the owner of the estate to raise that amount, although by reason of the fact that one or more of the younger children may not have attained a vested interest, the number among whom it is to be distributed cannot be ascertained.

Usual powers.

Powers of regulating the shares into which the portion fund is to be distributed, of fixing the times and ages at which they shall be paid (subject to the qualification before mentioned restraining payment before twenty-one or marriage), and of making provisions for maintenance, education and advancement of the portionists similar to those given with reference to the personal estate (see *ante*, p. 301), are conferred usually upon the husband, or if desired upon husband and wife and the survivor. A hotch-

Maintenance.

pot clause is also introduced. The trustees are further empowered, after the death of the father, to raise out of the rents and profits for the maintenance of any child entitled in expectancy to a portion interest on that portion calculated at such a rate (not exceeding a fixed rate) as the father (or father

Portions.

Advancement.

and mother or survivor) shall appoint; and also after his death or during his lifetime with his consent, to advance to any child entitled in expectancy a part (generally limited to one half) of the portion of such child, with a proviso that the amount advanced is to be taken into account as part of such child's portion. A further proviso is also inserted to the effect that the sum so advanced is not to be taken into account as part of the sum raiseable under the trusts of the term, unless the portion in respect of which it is advanced becomes vested in the child.

Direction that advances made by parents to go in full or part discharge of portion.

The hotchpot clause not as a general rule relating to advances, a clause should be introduced expressly directing that advances made by the parents or either of them shall go in full or part discharge of the portion provided, if this be desired.

Provision by parent's will whether advance by parent "in his lifetime."

It appears to have been taken as decided by authority that a provision made by a parent by will, came within the description of an advance made by a parent "in his lifetime": *Leake* v. *Leake*, 10 Ves. 477, 488, and see *Rickman* v. *Morgan*, 1 Br. C. C. 63, 2 *ibid.* 394; *Twisden* v. *Twisden*, 9 Ves. 413; *Folkes* v. *Western*, *ibid.* 456; *Onslow* v. *Michell*, 18 Ves. at p. 494. But in the case of *Cooper* v. *Cooper*, L. R. 8 Ch. 813, Lord *Selborne*, C., reviewed the decisions on which the assumed doctrine was based, and showed that Lord *Eldon*, in stating that such a doctrine existed (*p*), had been misled by a statement of counsel in the case. The decision, as Lord *Selborne* pointed out, turned in each case on the particular words of the clause in the settlement, but in none was any general rule laid down as universally applicable, and accordingly his Lordship refused to hold that a provision by will by A. B. could be treated as an advance in his lifetime under a clause worded "If A. B. shall in his lifetime advance or pay." It will therefore be advisable expressly to insert words pointing to a provision by will, *e.g.* in his lifetime *or by will*, etc.

Supposed rule explained and corrected in *Cooper* v. *Cooper*.

Advance by parent out of

If a father makes an advance out of his own pro-

(*p*) *Leake* v. *Leake*, 10 Ves. 488.

Portions.

his own property in or towards satisfaction of portion presumed to have been made to clear the estate for the other children.

perty to a child in satisfaction, partial or total, of his or her portion, in the absence of contemporaneous evidence showing a contrary intention, he is presumed to have made it for the purpose of clearing the trust estate from the claim of the child so advanced for the benefit of his other children: *Noel* v. *Walsingham*, 2 S. & S. 99; *Lee* v. *Head*, 1 K. & J. 620; *Ford* v. *Tynte*, 2 H. & M. 324, and not for himself.

Presumption may be rebutted.

But if a contract be proved on the part of the father to purchase for his own benefit the share which such child would have received under the trusts of the settlement, or if it be shown that the advance was made in substitution for an appointment out of the portion fund for the purpose of giving a sum of cash in lieu of a charge, in each case the presumption will be rebutted, and the portion purchased will become part of the father's estate: *Samuel* v. *Ward*, 22 Beav. 347, 350; *Ford* v. *Tynte*, 2 H. & M. 324. A direction in the settlement that "any advance made by the father in his lifetime is to be taken in or towards satisfaction of the portion provided by the settlement for a younger child unless the father shall declare the contrary," means that, if the father makes an advance to an object of the power without any declaration of intention in respect to it, the advance operates to the exoneration of the estate charged with the portion, but that the father is at liberty to declare that the child advanced shall notwithstanding receive its full portion; or is at liberty to consider himself *pro tanto* the purchaser of the portion, and to declare in effect that it shall remain a charge upon the estate for his benefit": per *Leach*, V.-C., in *Noel* v. *Lord Walsingham*, 2 S. & St. at p. 110.

To obviate all question it may be advisable in the settlement itself to insert a distinct provision, that in the event of any advance being made by the parent, such parent shall, or (if so desired) shall not, be treated to the extent of the advance as a purchaser of the child's share.

Presumption against double portions.

Closely allied with the doctrine already discussed, which precludes the child entitled to the family estate from competing with the "younger children,"

Portions.

is the doctrine of the "presumption against double portions." This presumption has its origin in the well-established principle that a parent is under an obligation to provide for his child; and consequently that in providing a portion for his child, he is satisfying a debt which he owes; and as a man cannot reasonably be presumed to intend to pay a debt twice, a parent, in giving portions to his child by two different instruments, is *primâ facie* presumed to intend that the later provision shall be substituted for the earlier: *Wetherby* v. *Dixon*, 19 Ves. 406 (*q*).

Presumption confined to portions.

This presumption is confined to the case of children, and of provisions by way of portion, and does not apply to the case of a mere gift by way of bounty. Nor does any such presumption arise in the case of a provision for wife.

Meaning of term "portion."

The judges have been generally averse to giving any precise definition of the word "portion." "Portions for children are, I think, generally understood to be sums of money secured to them out of property springing from or settled upon their parents; and although there may no doubt be cases in which provisions for children out of property in which the parents take no interest may well be called portions, I think that such provisions would only receive that designation where the nature or context of the instrument gives them that character": per *Turner*, V.-C., in *Jones* v. *Maggs*, 9 Hare, 605, 607. "The word [portion] properly signifying a distributive part in the case of a family settlement, the provision for the younger children acquired the name of 'portions,' because a portion or part was taken out of the estate to be distributed among the younger children": per *Kindersley*, V.-C., in *Watt* v. *Wood*, 2 Dr. & Sm. 56, 60.

Provision by way of marriage settlement.

A provision made by a father for his child by a settlement on the child's marriage, is always treated as a portion, and the mode in which that provision is settled is immaterial: *Tussaud* v. *Tussaud*, 9 Ch.

(*q*) It may be a question, whether, having regard to the language of sect. 21 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the same principle will not apply to the case of a mother making provision for her child out of her separate property.

Portions.

D. 363, per *Jessel*, M.R. A settlement of real estate, though not strictly a portion, would be an advancement, and might fall within the rule: *Leake* v. *Leake*, 10 Ves. 477, 488.

Provision by will.

Every provision made by will is not necessarily a portion, *e.g.*, the gift of a diamond necklace would not be a portion. The nature of the benefit as well as its value must be taken into consideration, but a bequest to a child of a sum of money of sufficient amount, whether it be given absolutely, or for life with a superadded general power of appointment: (*Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71), or to a daughter for life with remainder to her children (*Lady Edward Thynne* v. *Earl of Glengall*, 2 H. L. C. 131), or for life with remainder to her husband, remainder to her children (*Weall* v. *Rice*, 2 Russ. & M. 251) is a portion: see per *Jessel*, M. R., in *Tussaud* v. *Tussaud*, 9 Ch. D. at pp. 366, 367.

Statement of the general rule as to portions.

The general rule may be thus stated. The Court presumes that a parent (including in that term the person or persons standing *in loco parentis*, as to which see *infra*) does not intend to give double portions to his children.

Satisfaction.

If a father makes a provision by way of covenant for a child in a settlement upon marriage, and afterwards makes provision by will for that same child, it is *primâ facie* to be presumed that such parent does not mean a double provision: *Weall* v. *Rice*, 2 Russ. & M. 267; in other words, the later provision is presumed to be a satisfaction of the provision made by settlement.

Ademption.

On the other hand, where a parent by his will gives a portion to his child, and afterwards on the marriage of that child, or some other occasion, makes a settlement either by gift or a binding contract in his lifetime in favour of the same child, then *primâ facie* the later provision is presumed to be an ademption of the gift by will: *Trimmer* v. *Bayne*, 7 Ves. 508; *Pollock* v. *Worrall*, 28 Ch. D. at p. 555; *Montagu* v. *Earl of Sandwich*, 32 Ch. D. at p. 535. The presumption is founded on the assumption that in making the second instrument, the maker of it supposes himself to be substantially

Portions.

satisfying the obligations, whether moral and implied, or expressed, of the first: *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 89.

"The principle" (of ademption by a subsequent provision) "is that the will shews the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution he advances one of his children on marriage, or going to establish himself in the world, or the like, it is to be presumed as *præsumptio juris et de jure* that the advancement is an anticipation of the testamentary provision": per *James*, L.J., in *Fowkes* v. *Pascoe*, L. R. 10 Ch. 350.

Presumed intention.

In the case of ademption as well as satisfaction it is a question of presumed intention. Of course the presumption must yield to any sufficient indication of intention on the part of the maker of the instrument, if expressed on the face of the document, or shown by intrinsic evidence derived from the nature of the two provisions; or the presumption, like any other legal presumption, may be rebutted by extrinsic or parol evidence to shew what was the intention of the maker of the instrument: *Debeze* v. *Mann*, 2 Br. C. C. 165, 166; *Weall* v. *Rice*, 2 Russ. & M. 267; *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; *Tussaud* v. *Tussaud*, 9 Ch. D. at p. 378.

Ademption presumed more easily than satisfaction.

The presumption is more easily displaced where the will follows the settlement than where it precedes it; in other words, ademption of a portion is more easily presumed than satisfaction: *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; *Tussaud* v. *Tussaud*, 9 Ch. D. at p. 380; *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525, 547. The reason for this is obvious, for the will being an ambulatory and revocable, as well as a voluntary instrument, it can be more readily presumed that the testator intended to substitute the provision in the settlement for that contained in the will, either entirely, if the provision in the settlement is larger than or equal to the legacy, or if less, then *pro tanto*; whereas, where the settlement precedes the will, the persons interested under the covenant have acquired rights which the testator is under an obligation to satisfy—

Portions.

a liability "which he cannot revoke or avoid": *Tussaud* v. *Tussaud*, 9 Ch. D. at p. 380, per *Cotton*, L.J.

What is sufficient to rebut presumption.

The question, what is sufficient to rebut the *primâ facie* presumption, must be decided in each case as a matter of construction by the tribunal before which the question comes to be tried: *Weall* v. *Rice*, 2 Russ. & M. 267. Consequently, no universal rule can be laid down on the subject, but it may be stated generally that where the provisions in both instruments are of the same nature, or there are but slight differences between them, the two instruments afford intrinsic evidence in support of the presumption. Where, on the other hand, the two provisions are of a different nature, or there are great differences between the two, then the two instruments afford intrinsic evidence in favour of a double provision—in other words, against the presumption.

Questions arising with regard to satisfaction.

One question for consideration is whether the provision made by the later is given to be enjoyed in the same, or in nearly the same manner, as that which is given by the earlier instrument. Another most important question is whether the parties to be benefited by the one instrument are the same as the parties to be benefited by the other; and if one of the persons who takes under the settlement a substantial interest takes no interest under the will, it is a strong argument against the presumption of satisfaction. Again, the circumstance that the two documents, the will and the settlement, are contemporaneous, or practically so, so that both must be taken to be in the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum: *Horlock* v. *Wiggins*, 39 Ch. D. 142, but this was not a case of double portions.

Hall v. *Hill*.

In *Hall* v. *Hill*, 1 Dr. & W. 94, a father, on the marriage of his two daughters, executed to the intended husband of each daughter his bond, with warrant of attorney for confessing judgment thereon, conditioned for payment to the husband of 800*l*. by instalments, part to be paid during his life and 400*l*. upon his (the father's) decease, which sum of 800*l*.

Portions.

was by the settlement recited to be the daughter's portion, and by the settlement the intended husband executed a bond for 800*l.* to the trustees of the settlement, which was settled upon the intended wife and issue. By his will made afterwards the father devised all his real estate to a trustee upon trust to pay his widow an annuity, and after certain other bequests, to pay to one of his said daughters the sum of 800*l.*, and to the other the sum of 600*l.* The sum of 600*l.* was in fact all that remained due to the husband of that daughter, 200*l.* having been paid off in the testator's lifetime: *Sugden*, L.C., held that in neither case could the daughter's legacy be treated as given in satisfaction of the 800*l.* secured by the bond to the son-in-law, which was the consideration for the bond given by the son-in-law to the trustees of the settlement, a legacy to a daughter not being a satisfaction of a debt due to that daughter's husband. See also *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; *Tussaud* v. *Tussaud*, 9 Ch. D. 363.

Lady Edward Thynne v. *Lord Glengall.*

The case of *Lady Edward Thynne* v. *Lord Glengall*, 2 H. L. C. 131, is a leading case on the subject of satisfaction of the obligation of a covenant by a subsequent legacy, and there the presumption was held not to be rebutted.

In that case, Mr. Mellish, on the marriage of his daughter in July, 1830, with Lord Edward Thynne, having agreed to give her a portion of 100,000*l.*, transferred to the four trustees of her marriage settlement 33,333*l.* 6*s.* 8*d.* Consols, and executed a bond to secure to them payment of an annuity of 2000*l.* during his life, and the transfer to them by his heirs, executors, &c., on his death, of 66,666*l.* 13*s.* 4*d.* Consols, if his said daughter or any child of the marriage should be then living. The trusts of the 33,333*l.* 6*s.* 8*d.* were to pay the income to Lord E. Thynne during his life, and after his decease to Lady E. Thynne for life, with remainder for the benefit of the child or children of the marriage, as Lord and Lady E. Thynne or the survivor should appoint. The trusts of the annuity and the 66,666*l.* 13*s.* 4*d.* Consols when paid and transferred were for the daughter's separate use for

Portions.

life, and after her death upon trust for the *child or children of the marriage* as *Lord and Lady E. Thynne should* by deed appoint, and in default of appointment in trust for the child or children of the marriage, who, if male, should attain twenty-one, or female, should attain that age or marry with consent as there mentioned. By his will dated November, 1833, Mr. Mellish gave to two out of the four trustees of the settlement one moiety of his residuary estate in trust to pay the interest to his said daughter for her separate use for life, remainder for *her children*, in such shares as *she* should by deed or will appoint, and in default of appointment to such children equally, sons to take vested interests at twenty-one, and daughters at that age or marriage. There the Court held that the daughter was not entitled to the moiety of the residue in addition to the sum secured by the bond, but that the share of residue was a satisfaction of the sum secured by the bond.

Differences insufficient to rebut satisfaction.

The differences were that by the settlement the children of the *particular* marriage only were to be the objects of the power of appointment, and to take in default of appointment, and the power of appointment was given to the wife *and* husband. By the will the daughter's children by *any* marriage were held entitled to be admitted to the privilege, but the power of appointment was limited to the daughter alone.

Montagu v. *Earl of Sandwich.*

Again in the case of *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525, where a father had by a settlement on the marriage of his second son covenanted to pay him an annuity of 1000*l.* for life, and to charge the annuity on a sufficient part of the real estate he might die seised of, and subsequently by his will devised his real estate "subject to the charges and incumbrances thereon" in strict settlement on the first and other sons in tail male and gave his *second* son legacies the income of which when invested would considerably exceed 1000*l.* per annum: it was held by the majority of the Court of Appeal (overruling *Pearson*, J.) that the words "subject, &c.," were too general to be treated as so particularly referring to an existing liability as to rebut the

Portions.

presumption against double portions, although the 1000*l.* was practically speaking the only charge in existence at the time of the testator's death, and that consequently the second son was not entitled both to the legacies and to the annuity.

Differences insufficient to rebut ademption.

Differences which would have been held sufficient to rebut the presumption of satisfaction and even wide differences, have for the reasons before stated been held insufficient to rebut the presumption of ademption.

Lord Durham v. *Wharton.*

A leading case on the subject is that of *Lord Durham* v. *Wharton,* 3 Cl. & F. 146. There William Lambton bequeathed 5000*l.* charged upon his real estates to his niece Susan the daughter of General Lambton, and devised the estates so charged to the said General Lambton. General Lambton by his will made in 1788, gave 10,000*l.*, to his said daughter for life, and after her death in trust for her children. In 1790, Susan married Mr. Wharton. On her marriage her father advanced 15,000*l.* as her marriage portion and in consideration thereof Mr. Wharton settled upon her 500*l.* per annum pin money, a jointure of 1,200*l.* per annum if she survived him, and also 30,000*l.* for the younger children of the marriage, and it was expressly declared that the portion of 15,000*l.* was to be in full satisfaction and discharge of all sums of money to which Susan was entitled under her *uncle's* will. It was held that the legacy of 10,000*l.* contained in her *father's* will was adeemed by the settlement.

It was strongly urged on her behalf that the express declaration that the 15,000*l.* was to be in satisfaction of the uncle's legacy, which was a debt due from her father's estate, amounted to a statement, on the principle of "*expressio unius est exclusio alterius,*" that the legacy of 10,000*l.* was still to subsist. This argument however did not prevail, it being pointed out that to satisfy by a legacy the sum charged by the uncle's will, which was a debt due from the father's estate, an express declaration was necessary, whereas in the case of what was at the outside only a moral obligation, a portion in a parent's will, no such express declaration was

Portions.

required, the presumption of law supplying the place of such a declaration. See, for other instances of ademption: *Trimmer* v. *Bayne*, 7 Ves. 508; *Platt* v. *Platt*, 3 Sim. 503; *Powys* v. *Mansfield*, 6 Sim. 528; 3 My. & Cr. 359; *Pollock* v. *Worrall*, L. R. 28 Ch. D. 552.

Gift by father to child before date of will not presumed to be on account of subsequent legacy.

"There is no presumption of law that the payment by a father of a sum of money to his child before the date of the father's will is to go against a legacy to that child," per *Wickens*, V.-C., in *Taylor* v. *Cartwright*, L. R. 14 Eq. 167, p. 176; unless such prior gift is at the time accepted and acknowledged by the child to be on account and in part of the benefit to be left by the donor's will: *Upton* v. *Prince*, Cas. temp. Tal. 71, and see *Re Peacock's Estate*, L. R. 14 Eq. 236.

Ademption total or *pro tanto*.

Where the benefit conferred by the later instrument is equal to or exceeds the legacy, a total ademption will be presumed. Where the subsequent gift is less than the legacy an ademption *pro tanto* only will be presumed: *Pym* v. *Lockyer*, 5 My. & Cr. 29; *Lord Chichester* v. *Coventry*, L. R. 2 H. L. at p. 92; *Pollock* v. *Worrall*, 28 Ch. D. at p. 555.

Satisfaction *pro tanto*.

And so there may be a partial satisfaction, or a satisfaction *pro tanto*, *i.e.*, a provision by will may satisfy one part of the covenant without satisfying the other parts of it, *e.g.*, if a father on a daughter's marriage settles 10,000*l.* on her for life with remainder to the children of the marriage, a bequest of 10,000*l.* to that daughter would satisfy her life interest in the 10,000*l.*, but would leave the interest of the children untouched: see per *Lord Romilly*, in *Lord Chichester* v. *Coventry*, 2 L. R. H. L. at p. 95; *M'Carogher* v. *Whieldon*, L. R. 3 Eq. 236.

Ademption of, and satisfaction by, gift of residue.

Upon this principle a bequest of a share of residue may be adeemed either partially or entirely by a subsequent portion: *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93; and conversely a portion may be satisfied either partially or entirely by a gift of residue: *Rickman* v. *Morgan*, 1 Br. C. C. 63; 2 Br. C. C. 394; and per Lord *Cottenham*, C., in *Lady Edward Thynne* v. *Earl of Glengall*, 2 H. L. C., at pp. 153, 154; *Lord Chichester* v. *Coventry*, L. R. 2 H. L., at p. 88.

Portions.

Rule of ademption applicable only for benefit of children.

Although the ademption of a legacy must necessarily *pro tanto* increase the residue for the benefit of residuary legatees, the application of the rule to the bequest of a share of residue is not to be carried further than may be necessary to produce an equal distribution among the children; and, consequently, where a father has directed his residue to be divided in equal shares among his children, advances made by him to a child are not to be brought into account in estimating the residue for the benefit of a stranger. Thus, where a testator gave his wife a life interest in half his residue, and subject thereto directed the residue to be divided among his children, and subsequently made advances to some of his children, the Court held that the widow had no claim to have the advances brought into account for the purpose of increasing the residue in which she had a life interest, but that she was only entitled to one-half of the actual residue: *Meinertzhagen* v. *Walters*, L. R. 7 Ch. 670; *Stewart* v. *Stewart*, L. R. 15 Ch. D., at p. 547.

Ademption as between different gifts by same will.

As between different gifts by the same will to a child, the gift to be adeemed by a subsequent advance to that child is that which the most nearly resembles such advance. A father bequeathed to his son H. an absolute legacy of 3000*l.*, and his residue to trustees upon trust as to one-third for the benefit of H. for life, with remainder upon trust for his children and issue as he should appoint, and in default of such appointment in trust for his children, sons at twenty-one, daughters at twenty-one, or marriage with consent of parents or guardians, and in default of children for his next of kin, as if he had died possessed thereof unmarried and intestate. By the settlement made subsequently on the marriage of H., a sum of 2000*l.* New Three-and-a-half per Cent. Bank Annuities was settled by the testator upon trust for the wife of H. for life for her separate use without power of anticipation, and after her death to H. for life, and after the decease of the survivor in trust for the children of the marriage, sons at twenty-one, daughters at twenty-one, or marriage with like consent; and if there should be no child of

Portions.

the marriage taking a vested interest upon trust for the appointees by will of H., and in default of appointment for his next of kin, as if he had died possessed thereof unmarried and intestate. It was held that, as between the two testamentary provisions, the bequest of the share of residue and not the absolute legacy was adeemed *pro tanto;* that bequest and the provision by the settlement being each a provision for the benefit of H. and his children: *Montefiore* v. *Guedalla,* 1 De G. F. & J. 93.

Provisions must be *ejusdem generis.*

In the old case of *Bellasis* v. *Uthwatt,* 1 Atk. 426, Lord *Hardwicke,* C., laid it down that "When a bequest is taken to be by way of satisfaction for money before due, the thing given in satisfaction must be of the same nature and attended with the same certainty as the thing in lieu of which it is given, and land is not to be taken in satisfaction for money, nor money for land:" and see *Bengough* v. *Walker,* 15 Ves. 507, 512; *Cooper* v. *Cooper,* L. R. 8 Ch. 819, n.; or, as it may be said, the provision to satisfy must be *ejusdem generis* with that to be satisfied: *Holmes* v. *Holmes,* 1 Br. C. C. 555. But this statement of law has been somewhat modified by later decisions: *vide sup.* as to satisfaction by residue, &c.

In considering difference of gifts difference of instruments immaterial.

For the purpose of considering the difference between the two gifts, the difference of the two instruments by which those gifts are made (whether by instruments *inter vivos,* or whether by a will or codicil, or whether by an act *inter vivos* and will), is immaterial: see per *Fry,* J., *Lawes* v. *Lawes,* 20 Ch. D., at p. 85.

A covenant by a father in his daughter's marriage settlement to pay a portion was treated as a satisfaction of a debt of a smaller amount then due from him to such daughter: *Chave* v. *Farrant,* 18 Ves. 8.

And so, although a bequest or advance of a share of a mill or other business premises would not *primâ facie* be a satisfaction of a debt or ademption of a legacy, yet if the donor puts upon such share a money value the presumption may arise.

The distinction is well explained by *Jessel,* M. R., in *Lawes* v. *Lawes, supra,* at p. 88: "Where a testator gives to a child a beneficial lease or share of

Portions.

works or any other thing and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise. And when he gives it as being of larger amount than the legacy and the legatee takes it, he takes it at the estimated amount, and in that case it makes no difference whether the testator directs the thing to be sold and gives him the proceeds, or directs the thing to be taken as a specific amount. In either case he shows his intention to give a definite amount."

Thus in *Bengough* v. *Walker,* 15 Ves. 507, a bequest of a share in a certain mill which was directed to be made up to the value of 10,000*l.*, although charged with a life annuity of 20*l.*, was held to be a satisfaction of a portion of 2000*l.*

In *Vickers* v. *Vickers,* 37 Ch. D. 525, a gift of a share of residue, which residue specifically comprised a business directed to be sold, was held to be adeemed by the gift of that business by a deed; and there *North,* J., held that now that ademption can be *pro tanto,* it is not necessary that the testator should have placed a particular value on the business.

The fact that benefits are provided by the deed for the testator is not sufficient to prevent the transaction being treated as an advancement that will work ademption. See *Bengough* v. *Walker,* where the obligation of the legatee was to pay an annuity of 20*l.* a year; *Vickers* v. *Vickers,* where the testator was to be paid 520*l.* per annum out of the business. The obligation is a matter to be taken into consideration in estimating the value of the gift.

No satisfaction by share devolving by intestacy.

The share of an intestate's estate devolving on the covenantee in consequence of the intestacy of the covenantor cannot be treated as a satisfaction, the element of intention being necessarily absent: *Twisden* v. *Twisden,* 9 Ves. 413.

Adeemed legacy not restored by codicil.

A legacy adeemed is not set up again by a codicil confirming the will made subsequently to the settlement: *Hopwood* v. *Hopwood,* 7 H. L. C. 728.

Election.

The distinction between satisfaction and ademption lies in this, that in cases of satisfaction a case

Portions.

of election must always arise, while in cases of ademption it never can : per Lord *Romilly*, M. R., in *Lord Chichester* v. *Coventry*, L. R. 2 H. L., at p. 94.

As the parties interested under the settlement have purchased rights which cannot be revoked or avoided, if the person from whom they have purchased those rights makes by a subsequent instrument other provisions for the same parties, and states either expressly or by implication that the later benefits are intended to be in satisfaction of those to which they had acquired a right, they have a right to elect whether they will take under the former or the latter instrument.

In *Lady E. Thynne* v. *Earl of Glengall*, (2 H. L. C. 131, *vide ante*, p. 421), Lady E. Thynne and the children of the *first* marriage were objects of both gifts—they were covenantees and also legatees, but by the will the children of Lady E. Thynne by any *subsequent* marriage were also legatees. Therefore, the mother and children of the first marriage were bound to elect whether they would take under the settlement or under the will. If the children elected to take under the former they would be obliged to give up to the children of the later marriage, to compensate them for what they would lose by their insisting on the covenant, their share of the residue. If on the other hand they elected to take under the will, they must let in the other children to share with them under the settlement.

Election by married woman restrained from anticipation.

The question whether a married woman restrained from anticipation can elect, has been discussed, *ante*, pp. 326, 327.

Where satisfaction arises.

Satisfaction only arises where the person who makes the payment is the party bound to pay, or the owner of the estate charged with the payment ; *Samuel* v. *Ward*, 22 Beav. 347 ; and the payment is made out of the estate from which the portions are derived : *Douglas* v. *Willes*, 7 Hare at p. 328.

Effect of statement that natural love and affection is consideration of advance

Where a father being under an obligation to pay a debt to a child, advances in his lifetime to that child on his or her marriage or some other occasion a portion equal to or exceeding the debt, then satisfaction will be *primâ facie* at once presumed,

Portions.

and the fact that the advance made on the marriage of the child or other occasion, is expressed to be made in consideration of natural love and affection and that the intended husband of the child is ignorant of his wife's rights will not necessarily prevent the application of the doctrine of satisfaction: *Plunkett* v. *Lewis,* 3 Hare at p. 325; and see *Lawes* v. *Lawes,* 20 Ch. D. 81.

where portion advanced in lifetime equals or exceeds amount of debt.

But where the subsequent portion is the exact amount of the parent's debt to the child, it may be that the expression of natural love and affection as the consideration for the portion on the child's marriage, will be sufficient to displace the doctrine: *Plunkett* v. *Lewis, supra,* at p. 326; *Lawes* v. *Lawes,* per *Fry,* J., *supra,* at p. 84. This particular point does not however appear to have been argued before the Court of Appeal, but see judgment of *Lush,* L.J., p. 89.

Where it is the exact amount of debt.

To bring a case within the rule against double portions, the donor must be a parent or *in loco parentis.* The presumption being that the parent is by the second provision intending to satisfy the debt which is cast upon him by the position which he occupies as regards his child, gifts by different instruments by a stranger who is under no such obligations towards his donee being a mere bounty, supply no ground for presuming an intention on the stranger's part that the gift by the earlier shall be satisfied or adeemed, as the case may be, by that in the later instrument; and gifts by a person *in loco parentis* raise the same presumption as those by a parent.

Donor must be parent, or *in loco parentis.*

The question whether a person has in any particular case placed himself *in loco parentis* "is probably one of the most difficult of legal problems to solve": per *James,* L.J., in *Fowkes* v. *Pascoe,* L. R. 10 Ch. at p. 350.

A person *in loco parentis* is one who for any reason *means* to place himself in the situation of the lawful parent *for the purpose of making a provision for the child: Powys* v. *Mansfield,* 3 My. & Cr. at p. 367. It is the *intention* rather than the act of the person that has to be regarded. "A father is supposed to intend to do what he is in duty bound

What constitutes "person *in loco parentis.*"

Portions.

to do, namely, to provide for his child according to his means. So one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow": *ibid.* p. 368; see *Pym* v. *Lockyer*, 5 My. & Cr. 35.

Existence of real parent with and by whom child lives and is maintained not conclusive against assumption of character by another.

In considering whether the duties and office of the parent *in providing for his child* have been assumed by another, the fact that the child's father is alive, and that the child lives with and is maintained by the real parent, is by no means conclusive against the assumption: *Powys* v. *Mansfield*, 3 My. & Cr. 359. The fact to be tried is the intention of the party to place himself in the situation of the lawful parent for the purpose of providing for the children or child, and accordingly his declarations as well as his acts are admissible in evidence for that purpose. "Evidence of general conduct towards the child is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments containing the gifts or in extrinsic circumstances; and as part of such extrinsic circumstances the general conduct of the donor towards the family, and particularly towards the other children of it, may very properly be included in the consideration of his object and intention:" *Pym* v. *Lockyer*, 5 My. & Cr. at p. 36.

If the party alleged to have placed himself *in loco parentis* has paid the expenses of the child's education and has been consulted with reference to the children's marriages, and has been a party to the settlements made thereon either in addition to or without the lawful parent, all of which conditions were satisfied in *Powys* v. *Mansfield*, (*supra*) the conclusion is well-nigh irresistible that the character has been assumed: see *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

Legitimate and illegitimate children.

A distinction is made between legitimate and illegitimate children: *Ex parte Pye*, 18 Ves. 140. As the law does not recognise the relation between a putative father and his illegitimate child as imposing the natural obligation, the putative father stands as a stranger to his illegitimate child, and consequently

Portions.

the presumption does not arise. Although, as pointed out by *Grant*, M.R., in *Wetherby* v. *Dixon*, 19 Ves. at p. 412, the operation of this distinction is somewhat whimsical as giving the illegitimate an advantage over the legitimate child. But when the putative father has placed himself *in loco parentis* to his illegitimate child, or where in either of the instruments he has recognised a relationship between himself and such child, or has made the provisions in such a way as to indicate that they were given as portions (*Trimmer* v. *Bayne*, 7 Ves. 508; *Wetherby* v. *Dixon*, 19 Ves. 412; *Lawes* v. *Lawes*, 20 Ch. D. 81) the presumption will arise.

When ademption will be presumed where donor stranger to donee.

Ademption may be *primâ facie* presumed even when the donor is a stranger to the donee, if it appears by proper evidence (*q*) that the gifts by both instruments were made for an identical particular purpose.

Particular purpose.

A "particular purpose" need not be confined to some special use or application of the money—*e.g.*, apprenticing, advancing, or the like. It will be enough to show that the purpose of both gifts was to fulfil one and the same moral obligation or duty recognised as such by the donor, and originating in a definite external cause, although not such as the law would have recognised or presumed to exist: per Lord *Selborne*, in *Pollock* v. *Worrall*, 28 Ch. D. at p. 556.

In that case a testatrix, a widow, by her will bequeathed to a niece of her deceased husband "the sum of 500*l.*, according to the wish of my late beloved husband." She afterwards in her lifetime paid the niece 300*l.*, and made a contemporaneous entry in her diary that such payment was "a legacy from her [the niece's] Uncle John." The Court of Appeal there held that the legacy must be presumed to have been advanced to the extent of the 300*l.*, and that the presumption of only partial and not total ademption was not displaced by evidence that

(*q*) *I.e.*, evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor, whether communicated to the donee or not: *Pollock* v. *Worrall*, 28 Ch. D. at p. 556; *Kirk* v. *Eddowes*, 3 Hare, 509, 518.

Portions.

more than a year before the payment of the 300*l.* the testatrix had said that the legatee had been asked by her whether she would prefer 300*l.* at once to a larger sum at the testatrix's death, had replied that she would prefer an immediate gift of 300*l.*

Limitations to issue of marriage.

Limitations of Estates Tail, &c.]—Subject to the limitations before stated (*i.e.*, the jointure rent-charge, portions and portions term), the estate is limited to the issue of the marriage in tail, with (in general) an ultimate remainder to the settlor in fee simple.

In practice these limitations to the issue generally precede the declaration of the trusts of the portions term, but for convenience sake the consideration of these trusts has been anticipated.

Usual limitations.

The limitations will of course vary to suit the intentions of the settlors in each particular case, and several forms of limitations will be found in the precedents. But those usually contained in an ordinary marriage settlement are limitations to the use of the first and other sons successively according to seniority in tail male, with remainder to the use of the same sons in tail general, with remainder to the use of the daughters as tenants in common in tail, with cross-remainders in tail between them.

When the prevailing desire is to keep the estate together as long as possible, limitations to the daughters in tail male are often inserted before the limitations in tail general to the sons (*r*).

"Heirs of body" and "issue" in marriage articles.

The series of limitations first mentioned is similar to that which would be adopted by the Court itself in directing a settlement in pursuance of marriage articles, in cases where the words "heirs of the body" or "issue" are held to indicate an intention that the issue of the marriage are to take as purchasers, in which case a settlement is decreed in favour of daughters as well as of sons: *Dod* v. *Dod*, Ambl. 274; *Hart* v. *Middlehurst*, 3 Atk. 371; *Phillips* v. *James*, 3 De G. J. & S. 72. So in a similar case under a will: *Lady Glenorchy* v. *Bosville*, Ca. temp. Talbot, 3; S. C.

In will.

(*r*) This question will be further considered in the notes to the following Precedents of Real Settlements.

1 Wh. & Tud. L. C. Eq. 1; *Trevor* v. *Trevor*, 1 H. L. C. 239. Estates Tail, &c.

The word "issue" in a will is *primâ facie* equivalent to "heirs of the body," but it is a word of flexible meaning, its legal and technical meaning being descendants of any degree, its popular meaning children. If to the word "issue" be added words of limitation, *e.g.* to A. for life and "to his issue and their heirs," the issue are considered to take as purchasers, and the whole estate is given to them under these words of limitation: per *Wood*, V.-C., *Kavanagh* v. *Morland*, Kay at p. 24; *Montgomery* v. *Montgomery*, 3 J. & L. 47; *Morgan* v. *Thomas*, L. R. 9 Q. B. D. 643. When the word 'issue' is used in a deed as executed, as opposed to an executory instrument, it will, in the absence of context to the contrary, be construed in its legal technical, *i.e.* its largest meaning—descendants: *Re Warren's Trusts*, 26 Ch. D. 208, 215. So in *Harrison* v. *Symons*, 14 W. R. 959, *Wood*, V.-C., said that the instrument being a deed he did not feel justified in cutting down the word issue. Meaning of term "issue."

If the ultimate limitation, instead of being to the settlor in fee either directly or under the rule in *Shelley's Case*, is to the right heirs of some other person who takes no estate in the property, the heirs take as *personæ designatæ* as joint tenants, and consequently when the heirs are females they will not take as coparceners, for "none are called parceners by the common law but females or the heirs of females which come to lands or tenements *by descent*, for if sisters purchase lands or tenements of this they are called joint tenants and not parceners": Litt. s. 254. Ultimate limitation to the "right heirs." Heirs take as joint tenants.

Purchase is thus defined by Littleton:—"Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed." And Lord Coke on this passage points out that the word "purchase" does not mean 'buy' but take by title, either for consideration or freely of gift, in contradistinction to taking by descent: Co. Litt. 18 b. See *Mounsey* v. *Blamire*, 4 Russ. 384; *Swaine* v. *Burton*, 15 Ves. 365; *De Beauvoir* v. *De* Definition of term "purchase."

Estates Tail, &c.

Beauvoir, 3 H. L. C. 524; *Berens* v. *Fellowes*, 56 L. T. 391.

Inheritance Act, 3 & 4 Wm. 4, c. 106.

The Inheritance Act (3 & 4 Wm. 4, c. 106) enacts as follows :—

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

Sect. 3. "When any land shall have been devised by any testator who shall die after the 31st December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the 31st December, 1833, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof."

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

Sect. 4. "When any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of any of his ancestors contained in an assurance executed after the 31st December, 1833, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the 31st December, 1833, then and in any of such cases such lands shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land."

Object of section 4.

The object of this section is to provide in what course the land shall descend in case such purchaser shall not dispose of it, but not to alter the estate which he himself takes, see per *Kay*, J., in *Berens* v. *Fellowes*, 56 L. T. at p. 394.

Break of descent.

When the owner of real estate who has taken it by descent settles it, questions sometimes arise whether the effect of the settlement has been to break the descent or whether under the ultimate limitation the settlor has reserved or taken again such part of his or her *former* estate as was not disposed of by the former limitations of the settlement, so that the descent is not broken. Thus in *Heywood* v. *Heywood*, 34 Beav. 317, a lady entitled to real estate as heiress at law of her maternal grandfather by her marriage settlement made in 1866, conveyed it unto and to the use of trustees upon trust for herself and her heirs until marriage

Heywood v. *Heywood*.

Estates Tail, &c.

and after the marriage upon trust for herself for life for her separate use, with remainder to the children or child of the marriage, and in default of issue upon trust if she survived her husband for herself, her heirs and assigns. The ultimate trust provided that if she should die in his lifetime, the estate should from and after her death and such failure of issue as aforesaid be in trust for such person or persons, etc. as she should by will appoint, and in default of such appointment in trust for the person or persons who would on her decease have become entitled to the hereditaments in case she had died intestate and without having been married. She died in her husband's lifetime without issue and intestate. It was held that the marriage settlement had not broken the previous line of descent or created a new seisin in the lady so as to entitle her heirs general to take upon her death intestate. If she had died before marriage, or had survived her husband and died without issue, in either of those cases the latter part of sect. 3 would have applied and she would have taken as purchaser and not of her former estate, and her heirs general would have taken, but the statute had no application to the ultimate limitation which in fact took effect. The statute merely altered the nature of an estate limited to the settlor, or to the heirs of the settlor, but had no application to a limitation to a class of persons as purchasers, and consequently it was held that her heirs *ex parte maternâ* were entitled under the limitation and not her heirs general.

Moore v. *Simkin*.

So in *Moore* v. *Simkin*, 31 Ch. D. 95, where by a marriage settlement executed in 1810, a lady seised of real estate as to part as heiress of her mother, and as to the remainder as one of the coheiresses of her maternal great uncle settled it on limitations to the use of her husband for life, with remainder to the use of herself for life, with remainder to the use of the children of the marriage, and with an ultimate remainder "to the use of the right heirs of J. W. deceased (her mother) for ever." The settlor died in 1846, her husband in 1871; the ultimate limitation took effect on the death in 1880 of the surviving son of the marriage intestate and unmarried; it

Estates Tail, &c.

was held, that under the ultimate limitation the wife took the estate as part of the old estate to which she was entitled previously to the marriage, that the descent was not broken by the settlement, and that consequently her heirs *ex parte maternâ* took.

At what time "heirs" are to be ascertained.

A limitation in remainder to the right heirs of a deceased person will generally, at all events in the absence of any expression to the contrary, give a vested remainder in fee to the person answering the description at the time of the execution of the deed. But in the case of *Marquis Cholmondeley* v. *Lord Clinton*, 2 Jac. & W. 1, Sir T. *Plumer*, M.R., held that this rule was not universal, and as in that case the plain intention of the settlor as evidenced by the deed, the settlor being and knowing himself to be the person then answering that description, would have been entirely defeated by adopting such a construction, he held that the limitation gave a contingent remainder vesting in the person who happened to answer the description at the expiration of the estates previously limited (*r*). Where the person to whose heirs the estate is limited is living at the date of the execution of the deed, his heirs will be ascertained at his death.

5. Powers—The Settled Land Acts.

Express powers of leasing, sale, exchange, &c.

It was formerly usual to insert in settlements of real property express powers of leasing exerciseable by the tenant for life, either with, or more usually, without the consent of the trustees of the settlement; and powers of sale and exchange, &c., were, according to the general practice of conveyancers, vested in the trustees, such powers being usually made exerciseable with the consent of the tenant for life for the time being in possession. Having regard to the ample powers conferred by recent statutory enactments on

(*r*) In the same case on a previous occasion Sir W. *Grant*, M.R., had come to a contrary conclusion, holding that the strict construction of the limitation, viz., to give the settlor a vested remainder, must be adopted: see 2 Mer. 171. The case was heard in the House of Lords, but the point was left undecided: see 4 Bligh, 1.

Powers—The Settled Land Acts.

tenants for life, these express powers may, as a general rule, be omitted. If, however, in any particular instance, it is desired to extend the statutory powers, or to dispense with any of the restrictions and conditions attached to their exercise, provisions to that effect may be inserted in the settlement, and, in such case, the larger or less restricted powers will be exerciseable in the same way as if they were powers conferred by statute.

Settled Estates Act, 1877.

The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), still remains in force (*s*), and recourse may be had to its provisions whenever circumstances may render it advisable to do so.

By that Act all powers of leasing (except the power given by sect. 46 to tenants for life to grant leases for twenty-one years) and powers of sale, exchange, &c., are exerciseable only on application to the Court, and under its control. Such applications are now generally superseded by the exercise by limited owners of the powers conferred on them by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), as amended by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), and the Settled Land Act, 1887 (50 & 51 Vict. c. 30).

Powers conferred by the Settled Land Acts.

These powers, and the ancillary provisions of these Acts, will now be stated and considered. The provisions of the amending Acts will be noticed in connection with the enactments of the principal Acts to which they respectively relate (*t*).

Interpretation of "settlement."

(*s*) Sect. 2 of this Act thus defines the word "settlement" for the purposes of the Act:—"The word 'settlement' as used in this Act shall signify any Act of Parliament, deed, agreement, copy of Court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively." Compare the definition of the word given in the Settled Land Act, 1882, *post*, p. 439.

See as to leases under the Settled Estates Act, 1877, *ante*, sub tit. "LEASES," Vol. III., pp. 25 *et seq.*; and as to sales under that Act, *ante*, sub tit. "PURCHASE DEEDS," Vol. V., pp. 38 *et seq.*

(*t*) The powers of enfranchisement, exchange, leasing, sale, &c., conferred by this Act have already been noticed at some length under the appropriate headings: see Vol. II., pp. 895 *et seq.*; Vol. II., pp. 927 *et seq.*; Vol. III., pp. 28 *et seq.*; Vol. V., pp. 40 *et*

Powers—The Settled Land Acts.

Objects of the Settled Land Act, 1882.

The objects of the Settled Land Act, 1882, are, as indicated by its title, to facilitate sales, leases and other dispositions of settled land, and to promote the execution of improvements thereon.

The memorandum presented to Parliament along with the bill stated, that "the main object of this bill is to enable a tenant for life (which term is used to include generally the class of limited owners) to dispose by sale, lease or otherwise, of any part of the settled land, or even of the whole of it, proper provision being made for securing the purchase-money on a sale, and otherwise for protecting the interests of the remaindermen, and of others entitled to come in under a settlement."

"The general scheme of the Act is this: large powers of dealing with the settled estate are conferred upon the tenant for life. Among these powers the power of sale is one of the most important. The existence of trustees is (speaking generally) contemplated throughout the Act. Various duties are imposed upon them, particularly in relation to capital money. These duties relate to the receipt, the investment, and other application of the capital money, including the application of the money in improvements in the estate as defined by the Act. At the same time provision is made for payment of the capital money into Court and its application under the direction of the Court," per *Chitty*, J., in *Re Countess of Dudley's Contract*, 55 Ch. D. at p. 340.

The provisions of this Act, and of the amending Acts of 1884 and 1887, are as follows:—

I.—Preliminary.

Settled Land Act, 1882, s. 1.

Short title;

Sect. 1. "(1.) This Act may be cited as the Settled Land Act, 1882.

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seq. But since those volumes were published, numerous important decisions have been pronounced on questions arising as to the construction and operation of the Acts. These decisions will be noticed in the following pages, and it has been thought advisable to give in this place a connected statement of the provisions of the Settled Land Acts relating to the powers thereby given to tenants for life, &c., and so enable practitioners to decide whether, in framing settlements, they should simply rely on the statutory powers, or modify or enlarge them, if it should seem expedient.

"(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act (*u*).

Powers — The Settled Land Acts.

Commencement.

"(3.) This Act does not extend to Scotland."

Extent.

The amending Act of 1884 enacts as follows :—

Settled Land Act, 1884, ss. 1, 2, 3.

Sect. 1. "This Act may be cited as the Settled Land Act, 1884.

Short title.

Sect. 2. "The expression 'the Act of 1882,' used in this Act, means the Settled Land Act, 1882.

Interpretation.

Sect. 3. "The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein."

Construction of Act.

And by the amending Act of 1887, sect. 3, it is enacted that—

"This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts Amendment Act, 1887."

Settled Land Act, 1887.

Short title.

II.—Definitions.

Sect. 2. "(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

Settled Land Act, 1882, s. 2.

Definition of settlement, tenant for life, &c.

This definition is somewhat more full than that given in sect. 2 of the Settled Estates Act, 1887 (see *ante*, p. 437), but it seems to be identical in effect, except

Definition of "settlement" considered.

(*u*) Although a date is by this section fixed for the commencement of the Act, the operation of the Act is retrospective as regards trusts created by instruments made before the commencement of the Act. See the definition of settlement in sect. 2 (1), *supra*, and the provisions with regard to a trust for sale of land, sect. 63, *ante*, pp. 228 *et seq.* Also, by sect. 50, sub-s. 4, the operation of the Act is extended to assignments by way of mortgage and otherwise, and to acts done before the commencement of the Act, *post*, p. 486.

Commencement of the Act.

Powers — The Settled Land Acts.

for the omission from the later Act of the words at the end of the definition in the earlier Act "including any instruments affecting the estates of any one or more of such persons exclusively." These omitted words, if inserted in the Act of 1882, might have enabled an estate for life or other partial interest under a settlement to be sold separately: see Wolst. & Turn. S. L. Acts, 10.

Several instruments constituting one settlement.

A "settlement" may consist of a number of instruments whereby a particular interest is modified and regulated: Thus in *Re Earle and Webster's Contract*, 24 Ch. D. 144 at p. 147, *Pearson*, J., gave as an example of a settlement, a will and a marriage settlement executed by some person taking beneficially under the will, settling the property devised. See also *Wheelwright* v. *Walker*, 23 Ch. D. at p. 759. But the same learned judge held in *Re Knowles' Settled Estates*, 27 Ch. D. 707, that where the original settlement was complete in itself, and a derivative settlement was made by a daughter (an appointee of a reversionary interest under a power of appointment contained in the original settlement), the original settlement alone was "the settlement for the purposes of the Act," and that the summons need only be entitled in the matter of that settlement and served only on the trustees of that settlement; Messrs. Wolstenholme & Turner are of opinion that a deed of disentail, and resettlement of a remainder in tail, would form with the original settlement one settlement, but that separate deeds, by which two undivided shares are originally settled, do not form one settlement: see S. L. Acts, 10. The successive limitations need not be all created by the instrument, provided that they arise under or by virtue of the settlement. The term "settlement" includes deeds, &c., binding the equitable interest in the land as well as those which are perfected by acquisition of the legal estate.

Settled Land Act, 1884, s. 8.

A tenant by the curtesy, when his estate is in possession, has the powers of a tenant for life under the Act of 1882: see sect. 58 (1), *post*, p. 493. In such a case there is no settlement within the above definition; to remedy the difficulties thus arising, the Settled Land Act, 1884 (47 & 48 Vict. c. 18) enacts as follows:—

Sect. 8. "For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife."

Powers — The Settled Land Acts.

Curtesy to be deemed to arise under settlement.

Settled Land Act, 1882, s. 2.

Sect. 2 of the Act of 1882 contains the following further definitions for purposes of the Act :—

"(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

"(3.) Land (*x*), and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

"(4.) The determination of the question whether land is settled land for purposes of this Act or not, is governed by the state of facts and the limitations of the settlement, at the time of the settlement taking effect.

"(5.) The person who is for the time being under a settlement beneficially entitled to possession (*y*) of settled land for his life is,

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(*x*) Land in all Acts of Parliament includes freeholds, copyholds, and leaseholds : see stat. 13 & 14 Vict. c. 21, s. 4 ; and also incorporeal hereditaments, and an undivided share in land : see sub-s. 10 (i.) of sect. 2 of the Act of 1882, *post*, p. 444.

(*y*) "Possession," by sub-s. 10 (1), includes "receipt of income," and "income" includes "rents and profits," and therefore an equitable tenant for life answers the description.

An equitable tenant for life is, for the purposes of this Act, a tenant for life capable of exercising the statutory powers, and can convey the legal estate under sect. 20 of this Act : see *Re Morgan*, 24 Ch. D. 114 ; *Naylor and Spendla's Contract*, 34 Ch. D. 217.

The right to possession must be immediate, and not in reversion or expectancy : per *Baggallay*, L.J., in *Re Jones*, 26 Ch. D. at p. 741. *Semble*, a person whose life estate is preceded by a term of years which is vested in trustees for the management of the property, and which requires the trustees to take and keep possession of that property for the purpose of accumulation, is not a tenant for life within this section, as being "a person beneficially entitled to possession of settled land" : *Re Clitheroe Estate*, 31 Ch. D. 140.

So where land was limited to trustees for a fixed term of twenty years upon trust to manage and improve the same and accumulate the surplus rents and profit, and after the determination of the term (but *not subject to the term*) upon trust to settle and assure the same to the use of S. for life with remainder over : it was held that S., during the term, was not a tenant for life nor a person with the powers of the tenant for life : *Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 423.

Powers — The Settled Land Acts.

for purposes of this Act, the tenant for life of that land, and the tenant for life under that settlement.

"(6) If in any case there are two or more persons so entitled (*z*) as tenants in common or as joint tenants, or for other concurrent estates or interests, they together (*a*) constitute the tenant for life for purposes of this Act.

"(7.) A person being tenant for life within the foregoing definitions (*b*) shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land or his estate or interest therein is incumbered (*c*) or charged in any manner or to any extent (*d*)."

Reference may here be made to sect. 58 of the Act of 1882, which gives the statutory powers of a tenant for life to each of the persons mentioned in the section *when his estate or interest is in possession;*

(*z*) *I.e.*, entitled under the definition of sub-s. 5, *i.e.*, "for life": *Atkinson* v. *Bruce*, 30 Ch. D. 605; 31 Ch. D. 577.

Where land was limited to trustees during the life of A. and after his death to the use of his sons in tail male, with remainder to the use of the trustees during the life of her second son B. with remainder over, and the deed contained a declaration that the appointments were so made to the trustees upon trust to sell the life estates and pay the proceeds to A. and B. in equal shares as tenants in common. And A. and B. covenanted with their father and with the trustees that neither of them would claim the life estates in specie, it being the intention of the parties that the trusts for sale should be absolute and irrevocable; it was held by *Pearson*, J., that inasmuch as A. and B. could have bought the property if sold by the trustees, and would then have become tenants for life within the Act, they were able to sell as tenants for life under the Act. The father having died, there was no one to enforce the convenant. It is doubtful whether in any event the covenant could have been enforced, having regard to sect. 51: *Re Hale and Clark*, 34 W. R. 625.

(*a*) Where several undivided shares are settled by the same settlement, a tenant for life of one share cannot sell that share under the Act without the concurrence of the owner, whether for life, or in fee, of the other share: *Camden* v. *Murray*, 16 Ch. D. 161; *Re Collinge's Settled Estates*, 36 Ch. D. 516.

(*b*) *I.e.*, as defined by sub-ss. 5 and 6.

(*c*) If he falls within the definition of tenant for life, or a person with the powers of a tenant for life (sect. 58), then, although he may have himself incumbered the settled land, he retains all the powers over it conferred on a tenant for life; but sect. 50 (3) preserves the rights of the incumbrancer.

(*d*) Although owing to prior charges, &c., no income was nor could for a long time be, payable to the tenant for life, the tenant for life was held able to sell: *Re Jones*, 24 Ch. D. 583; 26 Ch. D. 736.

Powers — The Settled Land Acts.

also to sects. 59 to 62 inclusive relating to the exercise by or on behalf of infants, married women, and lunatics, of the powers given to tenants for life by the Act. These sections will be set out and considered *post*, pp. 491 *et seq.*

Settled Land Act, 1882, s. 2.

Sect. 2 of the Act of 1882 next proceeds to define the terms "trustees of the settlement," and "capital moneys arising under this Act."

"(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale (*e*) of settled land (*f*), or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

"(9.) Capital money (*g*) arising under this Act, and receivable for

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(*e*) This must be a present power of sale, and not merely a power to sell at some future time: *Wheelhouse* v. *Walker*, 23 Ch. D. at p. 761. Trustees of a personal settlement having power to vary investments have been held to be trustees for the purposes of the Act of after-acquired realty which became, by virtue of a covenant to settle such property, subject to the trusts of the settlement: *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595. Trustees with power to sell settled land in consideration only of ground rents, or of fee-farm rents, are not trustees for the purposes of the Acts: *Re Morgan*, 24 Ch. D. 114.

(*f*) A trustee with a power of sale exercisable with the consent of the tenant for life was held a "trustee of the settlement" for the purposes of the Act to receive a notice by the tenant for life (see sect. 45), of his intention to sell heirlooms: *Constable* v. *Constable*, 32 Ch. D. 233; see *Re Garnett Orme* v. *Hargreaves Contract*, 25 Ch. D. 595. It is advisable to declare in the settlement that the trustees shall be trustees of the settlement for the purposes of the Settled Land Acts.

(*g*) Money derived from the following sources will be "capital money arising under this Act," viz.:—

(i.) Money received in respect of a sale, or enfranchisement or for equality of exchange or partition of settled land (sects. 3, 4):

(ii.) Money arising by the sale of heirlooms (sect. 37):

(iii.) Money raised by mortgage of the settled land (sect. 18):

(iv.) The proceeds of the sale of securities subject to the settlement (sect. 22):

(v.) Consideration-money paid for variation or rescission of contracts (sect. 31 (ii.)):

(vi.) Money in Court under the Lands Clauses Acts or the Settled Estates Act, 1877 (sect. 32); or otherwise liable to be invested in land to be settled as the settled land: see *Clarke* v. *Thornton*, 35 Ch. D. 314.

Powers—The Settled Land Acts.

the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act."

Settled Land Act, 1884, s. 4.

By sect. 4 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18) it is enacted that,

Fines on a lease to be capital money.

"A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act."

Settled Land Act, 1882, s. 2.

Sect. 2 of the Act of 1882 continues as follows:—

"(10.) In this Act—

"(i.) Land (*h*) includes incorporeal hereditaments, also an un-

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(vii.) Money in the hands of trustees applicable to purchase of land (sect. 33):

(viii.) A proportion of the net proceeds of the sale of timber, where the tenant for life is impeachable for waste (sect. 35):

(ix.) A proportion of the rent under a mining lease (sect. 11):

(x.) Purchase-money paid in respect of leases for lives or for years. In this case, however, the trustees or the Court have discretionary powers to apply the money otherwise than according to the rules governing the application of other capital money (sect. 34):

(xi.) Fines on granting of leases (sect. 7). This point was left in doubt by the Act of 1882, but is expressly provided for by sect. 4 of the Act of 1884. As to moneys received for confirmation of a lease, see sect. 12 (iii.) of the Act of 1882, *post*, p. 453; and as to moneys received in respect of acceptance of surrenders and grants of licenses to copyholders, see sects. 13, 14, *post*, pp. 454, 455.

(xii.) Money paid as consideration for dedication of streets, &c. (sect. 16).

Meaning of term "land."

(*h*) The strict primary legal signification of "land" is arable land, Shep. Touch. 92, but it is also used in law to comprehend in law "any ground, soil or earth whatsoever. It legally includeth also all castles, houses and other buildings," and water, while it also includes all mines and minerals (unless expressly excepted) below the surface; "and lastly, the earth hath in law a great extent upwards, not only of water as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad cœlum*," Co. Lit. 4 a; see also 2 Bl. Com. 18.

"Land" here includes under "incorporeal hereditaments," manorial rights, rent-charges, tithes, advowsons, rights of way and other easements, and rights of common. The term "incorporeal hereditaments" in this section has been held to include tithes: *Re Esdaile*, W. N. 1887, p. 47; 54 L. T. 637; also a descendible dignity: *Re Carnac's Will*, 30 Ch. D. 136; see *Re Earl of Aylesford's Settled Estates*, 32 Ch. D. 162. The definition here given does not extend to "any estate or interest in land," as in the Statute of Limitations, sect. 1; see sub-s. (1) of this section, where land is spoken of as distinct from an estate or interest in land.

divided share in land; income (*i*) includes rents and profits; and possession (*k*) includes receipt of income: Powers — The Settled Land Acts.

"(ii.) Rent (*l*) includes yearly or other rent, and toll, duty,

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(*i*) "Income" will, under this definition, include rent-charges and all other rents and profits arising from land, whether fixed or occasional, *e.g.*, heriots and fines payable in respect of copyholds or renewable leases for lives: *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656; *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357; and, as it would seem, in respect of renewals of leases for years; and the proceeds of the sale of the next presentation to a living: *Earl of Albemarle* v. *Rogers*, 2 Ves. 477; *Cooke* v. *Cholmondeley*, 3 Drew. 1.

(*k*) "Possession" will include receipt of "net income," subject to expenses of management, see sect. 58 (ix.), *post*, p. 493.

As to provisions with regard to "income" in this Act, see sects. 10 (6), 31 (3), 48, 58 (1).

As to the meaning of "possession" see the observations of *North*, J., in *Re Morgan*, 24 Ch. D. 114; and see *ante*, p. 441, notes.

(*l*) "Rent" may be defined as a profit issuing out of lands as a compensation for the use thereof during the term for which they are demised, and an acknowledgment by the tenant of his tenure. Wharton Law Lex. As to the meaning of the term "rent," and its nature and incidents generally, see *Lord Zouche* v. *Dalbiac*, L. R., 10 Ex. 172; see also Co. Lit. 142 a, and Cruise, Dig. iii. tit. 28. "Rent."

"Tolls" are of several kinds:—(i.) "Tolls thorough," being the sums demanded for passing along a highway or street, or along the sea or a navigable river. Com. Dig. tit. Toll (*c*). (ii.) "Tolls traverse," payable in respect of leave to traverse or go over the land of another, as to which see Woodfall, L. & T. 74. (iii.) "Fair or market tolls," payable to the lord of a manor or other person having the right of holding a fair or market; the right of taking market tolls can exist only by special grant of the crown, or by prescription, and if the toll is unreasonable the grant will be void: *Heddey* v. *Wheelhouse*, Cro. Eliz. 558. (iv.) "Ferry tolls," payable in respect of crossing a river or creek. See as to tolls generally, Gunning on Tolls. "Tolls."

The chief kinds of duties are—(i.) Port and harbour dues, some of which are incident to the property in the soil of the port, *e.g.*, "anchorage," a duty for anchoring in a port; and "ballastage," a duty for taking ballast from the bottom of the port, while others arise from special custom or prescription—*e.g.*, "busselage," "keelage," &c. (ii.) "Wharfage" and "cranage," the former being duty payable for lodging goods on a wharf or shipping them therefrom; the latter being payable for the use of cranes, &c., in loading and unloading. (iii.) "Dock dues," the right to which depends on various acts of parliament under which the docks were constructed. See generally as to duties, Gunning, pp. 129 *et seq.* "Duties."

A "royalty" with regard to land is a payment in money or kind, reserved instead of or in addition to a fixed rent in leases of brick-fields and mines or quarries, and generally depending on the quantity of bricks, tiles, &c. manufactured or minerals raised. "Royalty."

Powers—The Settled Land Acts.

royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

"(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

"(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease (*m*) is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

"(v.) Manor (*n*) includes lordship, and reputed manor or lordship:

"(vi.) Steward includes deputy steward, or other proper officer, of a manor:

"Mining lease."

(*m*) Although the term "mining lease" includes "licence" for the purposes of this Act, there is an important difference between the two as regards their nature and incidents. A lease conveys an exclusive estate or interest in the minerals, but a licence merely entitles the grantee to work and appropriate the minerals, and leaves the property in them in the grantor till they are severed from the land; and unless the licence is in express terms exclusive of the grantor and those claiming under him, it will not enable the grantee to prevent the grantor and such other persons from also working the minerals: *Chatham* v. *Wilkinson*, 4 East, 469; *Carr* v. *Benson*, L. R. 3 Ch. 524. See generally as to mining leases and licences, Bainbridge on Mines, p. 513. The words "or any other land" authorize the working of mines by instroke and outstroke from adjoining mines (as to which, see *Lewis* v. *Fothergill*, L. R. 5 Ch. 103; *Jegon* v. *Vivian*, L. R. 6 Ch. 742); and also the raising through the shafts on the settled estates of minerals from under adjoining lands.

(*n*) See as to the nature and incidents of manors and seignories, Co. Litt. 58 a; 2 Bl. Com. 53, Cruise, Dig. i. pp. 19—34; Burton's Compendium, ch. vi. p. 319; and see *ante*, sub tit. PURCHASE DEEDS, Vol. V. p. 42, note (*q*).

"(vii.) Will (*o*) includes codicil, and other testamentary instrument, and a writing in the nature of a will:

"(viii.) Securities include stocks, funds, and shares (*p*):

"(ix.) Her Majesty's High Court of Justice is referred to as the Court (*q*):

"(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners (*r*):

"(xi.) Person includes corporation."

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations (s).

Sect. 3. "A tenant for life (*t*)—

"(i.) May sell the settled land (*u*), or any part thereof, or any Powers to

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(*o*) "Will" under this definition, includes a testamentary appointment by a married woman, as to which see *Willock* v. *Noble*, L. R. 7 H. L. 580; *Re Savage*, L. R. 2 P. & D. 78. The concluding words of the definition would apparently apply to informal testamentary dispositions by soldiers and sailors: as to which see 1 Vict. c. 26, s. 12, and *Herbert* v. *Herbert*, 1 Deane, 6; 1 Jur. N. S. 1177; *Re Parker*, 28 L. J. Pr. 91; and see *post*, sub tit. Wills, Vol. VII. pp. 363 *et seq.* They are not of course intended to include documents which, from defective execution or otherwise, could not be admitted to probate.

(*p*) This definition gives a wider meaning to the term "securities" than that which it ordinarily bears. In the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), sect. 3, the term "securities" includes Government securities and any security of any foreign state, any part of her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by anybody corporate or company, or person in the United Kingdom, and all stocks, funds and effects.

(*q*) As to the jurisdiction of the County Courts in England, see sect. 46, *post*, p. 485; and as to the jurisdiction of the Civil Bill Courts in Ireland, see sect. 65, *post*, p. 498.

(*r*) As to constitution of the Land Commissioners for England, see sect. 48, *post*, p. 485. By sect. 65 (9), *post*, p. 498, the Commissioners for Public Works in Ireland are substituted for the Land Commissioners.

(*s*) As to the notices to be given by tenants for life before exercising their statutory powers, see *post*, pp. 481 *et seq.* The powers conferred by this Act apply to land subject to settlements made by deed, will, or otherwise either before or after the commencement of the Act, and override any express powers or provisions contained in any such settlement: see sect. 2 (1), (5), *ante*, p. 439, and sect. 56 (2), *post*, p. 489. The tenant for life may sell

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For Notes (*t*) and (*u*), see next page.

Powers—The Settled Land Acts.

easement, right or privilege of any kind, over or in relation to the same; and

tenant for life to sell, &c.

"(ii.) Where the settlement comprises a manor—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes (*x*), so as in every such case to effect an enfranchisement (*y*); and

"(iii.) May make an exchange of the settled land, or any part thereof, for other land (*z*), including an exchange in consideration of money paid for equality of exchange; and

"(iv.) Where the settlement comprises an undivided share in

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in opposition to the wishes of the remainderman, provided he is not selling improperly: *Thomas* v. *Williams*, 24 Ch. D. 558; *Cardigan* v. *Curzon-Howe*, 30 Ch. D. at p. 540. The statutory powers enable a tenant for life to deal directly with the settled land according to his absolute judgment and discretion, subject only to the rule that he must exercise his powers for the benefit not only of himself but also of those entitled in remainder. These powers are exerciseable notwithstanding the pendency of an administration action in which judgment has been given prior to the commencement of the Act, and, *semble*, also where the judgment is subsequent to the Act: *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531.

Infant.

When the tenant for life is an infant his powers can be exercised on his behalf by the trustees of the settlement without the direction or sanction of the Court, and, if there are no trustees, the powers are exerciseable by persons to be appointed for that purpose by the Court on the application of the guardian or next friend of the infant: sect. 60, *post*, p. 494.

Married woman.

Lunatic.

As to how the powers of a tenant for life are exercisable in the case of a married woman see sect. 61, *post*, p. 495. And as to a lunatic tenant for life see sect. 62, *post*, p. 496.

(*t*) As to persons having the power of a tenant for life for the purposes of this Act, see sect. 58, *post*, p. 491.

(*u*) As to powers of sale given to limited owners by various statutes for special public purposes, see *ante*, Vol. V. pp. 57 *et seq.*

(*x*) As to what are mining purposes, see *ante*, sub tit. LEASES, Vol. III. p. 29, note.

(*y*) As to enfranchisement of copyholds under the Settled Land Act, 1882, see *ante*, Vol. II., pp. 895 *et seq.*

(*z*) The land taken in exchange need not be of the same tenure as the land given, see Wolst. & Turn. S. L. Acts, 16: provided that if the land given in exchange is in England, the land taken must also be in England, unless the settlement otherwise directs, see sect. 4 (8), *post*, p. 450. "England" in Acts of Parliament includes Wales and Berwick-on-Tweed, see stat. 20 Geo. 2, c. 42, sect. 3; but not so in deeds or other instruments.

Powers — The Settled Land Acts.

land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition."

Regulations respecting sale, enfranchisement, exchange, and partition.

Sect. 4. "(1.) Every sale shall be made at the best price (*a*) that can reasonably be obtained.

"(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

"(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

"(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

"(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

"(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

"(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

"(8.) Settled land in England shall not be given in exchange for land out of England."

(*a*) A tenant for life may be restrained by injunction from selling in an improvident or fraudulent manner: *Wheelwright* v. *Walker*, 23 Ch. D. 752; *Cardigan* v. *Curzon-Howe*, 30 Ch. D. at p. 540; but not on merely speculative evidence of an expected future increase in value: see *Thomas* v. *Williams*, 24 Ch. D. 558. But neither this restriction nor that as regards a lease (sect. 7 (2), *post*, p. 450) is to apply to the case of an exercise by a tenant for life of his statutory powers for the purpose of erecting dwellings for the working classes, see Stat. 48 & 49 Vict. c. 72, sect. 11.

This Act does not authorise grants by a tenant for life in consideration, wholly or in part, of a fee farm rent, except for building or mining purposes, and then only with the sanction of the Court; see sect. 10, *post*, p. 451. If it is desired that the tenant for life should have power to make such grants, the settlement must contain an express provision to that effect.

Powers — The Settled Land Acts.

Special Powers.

Transfer of incumbrances on land sold, &c.

Sect. 5. "Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly."

IV.—Leases.

General Powers and Regulations.

Power for tenant for life to lease for ordinary or building or mining purposes.

Sect. 6. "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

"(i.) In case of a building lease (*b*), ninety-nine years:

"(ii.) In case of a mining lease, sixty years (*c*):

"(iii.) In case of any other lease, twenty-one years" (*d*).

Sects. 7, 8, and 9 contain regulations for the exercise of the statutory powers of leasing conferred by sect. 2. These sections are fully set out and considered, *ante*, sub tit. "Leases," Vol. III., pp. 28, *et seq.* (*e*).

(*b*) A "building lease" must contain a covenant to build: *Hallett to Martin*, 24 Ch. D. 624; see also *Re Sabin*, W. N., 1885, p. 197.

(*c*) A mining lease is a lease for mining purposes, including the sinking of unopened mines, see sect. 2, sub-sect. 10 (iv.).

Other leases.

(*d*) Under this category will come agricultural leases and leases of "water-mills, wayleaves, waterleaves" (*vide supra*), and of rights of shooting or fishery. A grant of wayleaves and other easements connected with mining purposes may be included in a mining lease (sect. 17, *post*, p. 456); but in the absence of express provision in the settlement the authority of the Court under the Settled Estates Act, 1877, will still be generally necessary for the grant of leases for terms exceeding twenty-one years, except in connection with building or mining purposes: see sect. 4 of that Act.

In Ireland a lease other than a building or mining lease may be granted under this Act for any term not exceeding thirty-five years. Sect 65 (7), *post*, p. 498.

(*e*) The restrictions imposed by these regulations on the statutory leasing powers may be relaxed, if desired, but, inasmuch as the provisions of those sections closely correspond with those formerly inserted as a matter of course in express powers of leasing, it is

Powers — The Settled Land Acts.

Variation of building or mining lease according to circumstances of district.

Sect. 10. "(1.) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

"(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

"(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm (*f*) or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

"(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order."

The Court has no power under this Act to authorise fee-farm grants or leases for longer than the statutory terms, except for building or mining purposes. In and near London, building leases are generally granted for terms of 99 years, but in the north of England grants in perpetuity and leases for very long terms of years are usual. A building lease of lands at St. Helen's, in Lancashire, for 600 years was authorized under the Leases and Sales of Settled Estates Act, 1856: *Re Cross's Charity*, 27 Beav. 592; and leases of lands near Leeds were authorized for 999 years, and in perpetuity at fee farm rents:

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apprehended that the question of such relaxation will so rarely arise, as to render further notice of these provisions in this place unnecessary.

(*f*) A fee-farm rent has been defined as a rent-charge reserved on a grant of lands in fee secured by power of distress, and amounting to at least one-fourth of the value of the lands at the time of reservation. 1 Bl. Com. ii. p. 37.

Powers—The Settled Land Acts.

Re Carr, 6 W. R. 776; but the Court in that case required evidence that the land could not be beneficially let for a shorter period. A general authority to grant building leases of an infant's lands for 200 years was refused in *Cecil* v. *Langdon*, 54 L. T. 418. It may therefore be sometimes advisable, especially if the property to be settled is situated in the north of England, that the settlement should contain a power for the tenant for life to make grants in consideration, wholly or in part, of fee farm rents, either for building and mining purposes, or generally. A great disadvantage attaches to grants in perpetuity, in that the grantees' covenants to repair &c., are not enforceable by the assignee of the rent against the assignee of the land: see *Haywood* v. *Brunswick Benefit Building Society*, 8 Q. B. D. 403; and see *ante*, sub. tit. PURCHASE DEEDS, Vol. V., pp. 277 *et. seq.*

Part of mining rent to be set aside.

Sect. 11. "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement (*g*), there shall be from time to time set aside, as capital money arising under this Act (*h*), part of the rent as follows, namely,—where the tenant for life is impeachable for waste (*i*) in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits" (*k*).

Effect of this section.

"Mining lease" here of course means a mining lease granted under the powers given by this Act. The section as to setting aside rent does not apply to leases granted by tenants for life under powers, statutory or otherwise, independent of this Act: see sect. 56, subsect. 1, *post*, p. 489. Open mines may be leased by a tenant for life, impeachable for waste, under his general

(*g*) For an instance of contrary intention: see *Re Duke of Newcastle's Settled Estates*, 24 Ch. D. at p. 143.

(*h*) The part set aside must be paid to the trustees of the settlement or into Court. For form of order under the similar provision of the Settled Estates Act, 1877, sects. 4 (3), 34, see Seton, 1490.

(*i*) As to waste in respect of mines, see *ante*, p. 394.

(*k*) The provisions of this section apply to a settlement under sect. 63 of this Act (as to which see *ante*, p. 228), notwithstanding that the words "impeachable for waste" are not strictly applicable to a person who is equitable tenant for life, of the rents and profits of land settled on trust for sale: *Re Ridge, Hellard* v. *Moody*, 31 Ch. D. 504.

power to grant leases, other than mining leases, for twenty-one years: *Campbell* v. *Leach*, Ambl. 740; *Clegg* v. *Rowland*, L. R. 2 Eq. 160; see also Co. Lit. 54 b. In such a case the whole of the rent or royalties will belong to the tenant for life: *Daly* v. *Beckett*, 24 Beav. 114; *Miller* v. *Miller*, L. R., 13 Eq. 263; if, however, he grants under this Act a lease for more than twenty-one years, one-fourth of the rent must be set aside. Where the tenant for life is without impeachment for waste, it is conceived that he may open mines and grant leases thereof for any term not exceeding twenty-one years, and appropriate the whole rent for his own benefit. Though a person entitled for life to income of proceeds of sale of land subject to a trust for sale, and to the rents until sale, is not strictly impeachable for waste, yet if a lease of unopened minerals is made by such a person under this Act, three-fourths of the rent must be set aside: *Re Ridge, Hellard* v. *Moody*, 31 Ch. D. 504. If it be thought advisable, a provision may be inserted in the settlement that no part of any mining rent shall be capitalized, but that the whole shall go as rents and profits.

Powers — The Settled Land Acts.

Modification of statutory provision as to mining rents.

Special Powers.

Sect. 12. "The leasing power of a tenant for life extends to the making of—

Leasing powers for special objects.

"(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title (*l*); and

"(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(*l*) This subsection meets the difficulty which arose in the case of *Cust* v. *Middleton*, 3 De G. F. & J. 33. In that case a testator entered into contracts to grant building leases at a peppercorn rent for the first few years of the term, and died without having granted the leases. He devised the estate in strict settlement, without any power of granting such leases. It was held that, inasmuch as the contracts did not conform to the provisions of the Settled Estates Act, 1856, the leases could not be granted thereunder, and that an application must be made for an Act of Parliament for the purpose.

Powers — The Settled Land Acts.

"(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable (*m*); but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require."

Surrenders.

Surrender and new grant of leases.

Sect. 13. "(1.) A tenant for life may accept, with or without consideration (*n*), a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

"(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

"(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

"(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

"(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease

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(*m*) In the absence of judicial decision, it does not seem clear whether money paid for confirmation of a void or voidable lease would belong to the tenant for life absolutely, or be capital money arising under this Act.

(*n*) In the original draft of the bill it was expressly provided that such consideration if paid in money should be receivable by the tenant for life for his own use. The general rule is that such money should belong to the tenant for life absolutely, provided he acts in good faith: see Wolst. & Turn., S. L. Acts, 26. The payment of such a consideration by the surrenderor will generally indicate that the value of the property has depreciated, so that the lessee cannot get any one to take the remainder of the term off his hands at the original rent. In such a case a new lease of the property will probably be at a lower rent than before the surrender. Perhaps the most equitable mode of dealing with such consideration money, in the interests of all parties concerned, would be that its apportionment and application should be left to the judgment of the trustees or of the Court, as provided by sect. 34 with regard to purchase-money paid in respect of a lease or reversion. It is, however, doubtful whether the consideration paid for the surrender of a lease could be deemed to be "*purchase-money* with regard to a lease" within the meaning of that section.

surrendered may be taken into account in the determination of amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions and conditions to be inserted in the new or other lease.

Powers — The Settled Land Acts.

"(6.) Every new or other lease shall be in conformity with this Act."

Copyholds.

Sect. 14. "(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

Power to grant to copyholders licences for leasing (*o*).

"(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

"(3.) The licence shall be entered on the Court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence."

Sect. 15. "Notwithstanding anything in this Act, the principal mansion house (*p*) on any settled land, and the demesnes thereof,

Restriction as to mansion house, park, &c.

(*o*) By the special customs of some manors, leases without licence are authorized: see Scriv. Cop. 5th ed. 330, and Shelford's Cop. 154; and according to the custom of some manors, *e.g.* that of Ealing, the lord's power of licence is restricted to leases not exceeding twenty-one years: see *Hanbury* v. *Litchfield*, 2 My. & K. 629; and this Act does not enable a tenant for life any more than a tenant in fee to grant licences contrary to the custom. Generally, however, a copyholder who, without licence from the lord, grants a lease for more than a year incurs forfeiture of his tenement: *Doe* v. *Bousfield*, 6 Q. B. 492.

Customs as to licences.

If the licence is granted on a fine, it is not perhaps quite free from doubt whether the fine will belong to the tenant for life absolutely or be capital money arising under this Act. It would however seem to be the better opinion that a fine paid upon a licence to demise, if in accordance with the custom of a manor, is a casual profit, like heriots and fines for renewals of perpetual leases for lives (*Brigstocke* v. *Brigstocke*, 8 Ch. D. 357), and therefore belongs to the tenant for life: see Wolst. & Turn., 21. Where a manor is brought into settlement, the deed should expressly provide whether the fines shall be capitalized, or belong to the tenant for life: see *Simpson* v. *Bathurst*, L. R. 5 Ch. 193.

(*p*) The exercise by the trustees of their discretion under this section, is not ousted by a direction in the settlement that the house shall not be sold: *Re Brown's Will*, 27 Ch. D. 179. The duty of the Court or trustees is not confined to the consideration whether the estate will sell better with than without the mansion house and park; and the consent of the mortgagee of the life estate will be required: *Re Sebright's Settled Estates*, 33 Ch. D. 429, 443. It has not been judicially decided what constitutes a mansion

Powers—The Settled Land Acts.

and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court."

Incidental to the statutory powers given to the tenant for life, are the powers of appropriating for streets, roads, or open spaces, any parts of the settled land: sect. 16; of dealing separately with the surface and the minerals with or without a grant or reservation of powers of working, wayleaves, and other easements, &c., connected with mining purposes (*q*): sect. 17; and of raising by mortgage money for enfranchisement (*r*), equality of exchange or partition (*s*), the money so received to be capital money (*t*): sect. 18.

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house within this section, and it may be a question whether a house in London would be such. It will be advisable at present, previously to the sale or lease of any house forming the principal house on any distinct settled estate however small, to obtain the consent required.

(*q*) For "mines and minerals" and "mining purposes," see sect. 2, sub-s. 10 (iv.). The power conferred by s. 17 obviates the necessity for the "previous sanction of the Court of Chancery," now the Chancery Division, under the Act to Confirm Sales, &c., 1862 (25 & 26 Vict. c. 108, s. 2). As to the power of trustees during a minority, see *Duke of Newcastle's Estates*, 24 Ch. D. 129.

(*r*) By the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 23, a limited owner may charge the land which has been enfranchised under that Act with the compensation money paid for enfranchisement and with the expenses of the enfranchisement with interest thereon not exceeding 5*l.* per cent. per annum, or by way of terminable annuity calculated on the same basis. Any such charge may be by deed by way of mortgage with under and subject to the provisions of the Conveyancing and Law of Property Act, 1881, and shall be a first charge on the land and shall have such priority as by sect. 33 of Copyhold Act, 1858, is assigned to the charges there expressed as first charges.

(*s*) This power of raising money by mortgage being only given in the event of the requirements specified, it will be the duty of the trustees, or of the Court, as the case may be (see sect. 22, *post*, p. 463), to see that the money is applied to the purpose for which it has been raised.

The receipt in writing of the trustees effectually discharges a mortgagee from being concerned to see that the money advanced by him is wanted for the purposes of this Act. Sect. 40, *post*, p. 519.

If it is desired that money should be raiseable by mortgage of the settled lands for any purpose other than those specified by this section, the settlement should contain express provisions to that effect.

(*t*) Money cannot be raised by mortgage under this Act to effect any improvement. Recourse must be had to Improvement

Undivided Shares.

Concurrence in exercise of powers as to undivided share (*u*).

Sect. 19. "Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share."

Conveyance (*x*).

Completion of sale, lease, &c., by conveyance.

Sect. 20. "(1.) On a sale, exchange, partition, lease, mortgage or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees (*y*), or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage or charge.

"(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights or privileges created, discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

"(i.) All estates, interests, and charges having priority to the settlement; and

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of Land Act, 1864 (27 & 28 Vict. c. 114), s. 49; or the sanction of the Court, must be obtained under the Settled Estates Act, 1877, sect. 21.

(*u*) This section does not, nor does anything in the Act enable a tenant for life to sell his own share in land separately: *Re Collinge's Settled Estates*, 36 Ch. D. 516.

(*x*) As to conveyances by tenants for life under this Act, see *ante*, sub tit. PURCHASE DEEDS, Vol. V., pp. 49, *et seq.*

(*y*) It has been decided by the Court of Appeal that upon a sale by an equitable tenant for life under this Act, where the trustees have not been admitted, the lord is not entitled under the words "on payment of customary fines, fees or other dues or payments" to require payment of any fines which would have been payable on the admittance of the trustees, but only the fine payable on the admittance of the purchaser: *Re Naylor and Spendla's Contract*, 34 Ch. D. 217. There is no such saving here of the rights of the lords of manors as in sect. 56 of the Settled Estates Act, 1877.

Powers — The Settled Land Acts.

"(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed (*z*); and

"(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

"(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly (*a*); but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls."

V.—Investment or other Application of Capital Trust Money.

Capital money under Act; investment, &c., by trustees or Court.

"Sect. 21. Capital money arising under this Act (*b*), subject to payment of claims properly payable thereout, and to application thereof for any special authorized object (*c*) for which the same

(*z*) It has been said by *North*, J., that these words include all estates and interests created subsequently to the settlement for the purpose of securing money, and therefore include a mortgage by a tenant for life of his life interest for the purpose of raising money: *Re Sebright's Settled Estates*, 33 Ch. D. at p. 438. A serious question arises, which may probably require judicial decision, whether or not these words also include a mortgage of his estate or interest by a remainderman. Such an extension, though apparently the logical consequence of the learned judge's dictum, would be clearly contrary to the spirit of the Act, and in great measure obstruct its operation.

(*a*) See note (*y*), *ante*, p. 457.

(*b*) Money bequeathed to trustees upon trust to lay out in the purchase of land to be settled in strict settlement may be invested as directed by this section, *e.g.* in debenture stock: *Re Mackenzie's Trusts*, 23 Ch. D. 750.

(*c*) The money will be received by the trustees or the Court: see sect. 22, *post*, p. 463.

Powers — The Settled Land Acts.

was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

"(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement (*d*), or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament (*e*), and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities:

"(ii.) In discharge (*f*), purchase (*g*), or redemption of incumbrances (*h*) affecting the inheritance of the settled land, or other the whole estate (*i*) the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, crown rent, chief rent, or quit rent, charged on or payable out of the settled land."

(*d*) The term "securities" includes stocks, funds, and shares: see sect. 2 (10), *ante*, p. 447. As to what securities are now authorised by law for the investment of trust funds, *ante*, pp. 255 *et seq.* And as to the duties and liabilities of trustees as regards investments, see *ante*, pp. 264 *et seq.*

(*e*) The Court will not allow capital money to be sent abroad: *Edwards* v. *Lloyd*, 54 L. T. 643; W. N. 1886, p. 37.

(*f*) *I.e.*, in or towards discharge, &c.: *Frewen* v. *James*, 38 Ch. D. 383.

(*g*) The word "purchase" was not in the corresponding sect. 34 of the Settled Estates Act, 1877.

(*h*) As to mortgages for long terms of years, see *Re Frewen, Frewen* v. *James*, 38 Ch. D. 383. Capital money has been allowed to be applied in discharging a mortgage affecting part of the land sold, and another mortgage affecting another part of the settled land retained in settlement: *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651. *Semble*, it cannot be applied in discharge of incumbrances on land which has since the date of the settlement been added to, not substituted for, the lands originally settled.

Incumbrances discharged by money arising from the sale of heirlooms need not be kept alive for the benefit of the infant remainderman in whom the heirlooms would have vested absolutely on attaining his majority: *Re Duke of Marlborough, Duke of Marlborough* v. *Marjoribanks*, 30 Ch. D. 127; 32 Ch. D. 1.

(*i*) It is to be observed that not the property, but the "estate in the property" is to be freed from incumbrances; and in this sense the section does not contemplate the discharge of incumbrances affecting less than the whole fee or other estate subject

Powers — The Settled Land Acts.

Sub-sect. (11) does not authorise the discharge of terminable charges, *e.g.* a jointure rent-charge, or statutory charges for terms of years under the Land Drainage and Improvement Acts, the capital and interest of which are liable to be paid off by instalments, and which the tenant for life would be bound to keep down. And accordingly it was held that such a land drainage charge was not an incumbrance within this sub-section, to the discharge of which capital money might be applied: *Re Knatchbull's Settled Estates*, 29 Ch. D. 588.

Settled Land Act, 1887, s. 1.

But now by the Settled Land Acts Amendment Act, 1887 (50 & 51 Vict. c. 30), sect. 1, it is enacted as follows:—

Amendment of section 21 of the Settled Land Act, 1882.

"Where any improvement of a kind authorised by the Act of 1882 (*k*) has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882."

Settled Land Act, 1882, s. 2.

The following other modes of investment on application of capital moneys are authorised by the Act of 1882:—

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to the settlement: *Re Sebright's Settled Estates*, 33 Ch. D. at p. 437.

The words "or other the whole estate the subject of the settlement" apparently apply to settled leaseholds and capital money arising under this Act. It would accordingly appear that if the settlement included freeholds and also leaseholds held for a short term of years, there is nothing in this section to prevent a tenant for life from selling the freeholds in order to free the leaseholds from incumbrances. It is however provided by sect. 53, *post*, p. 488, that the tenant for life shall, in exercising any power under this Act, have regard to the interest of all parties interested, and by sect. 44, *post*, p. 481, that the trustees in case of differences may apply to the Court.

(*k*) In *Re Lord Sudeley's Settled Estates*, 37 Ch. D. 123, *Kay*, J., held that this Act authorises the application of capital money in payment of such proportion only of the instalments as represents capital of the loan, and not of such proportion as represents interest.

"(iii.) In payment for any improvement authorised by this Act (*l*): Powers — The Settled Land Acts.

"(iv.) In payment for equality of exchange or partition of settled land:

"(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land (*m*):

"(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life (*n*)."

The words "so as to merge the leasehold interest in the reversion," which were at the end of this sub-section of the Bill, were struck out by the Commons Select Committee: see Wolst. & Turn., Settled Land Acts, 37. There is nothing in the clause as it stands to prevent a reversion not immediately expectant on the settled term from being purchased. A conveyance of the reversion in fee, even where the reversion is immediately expectant on the determination of the leasehold interest, if made in the

(*l*) In order that capital money may be applied in improvements, a scheme must be duly submitted under sect. 26. The Court will not sanction the application of capital money in recouping the tenant for life in respect of expenditure incurred by him in improvements not previously sanctioned: see *post*, p. 472.

See also, as to improvements, sect. 28 of this Act, as amended by the Settled Land Acts Amendment Act, 1887, *post*, pp. 473, 474. Improvements within the meaning of this Act may be effected out of capital moneys, notwithstanding that the settlement contains a trust for management which provides that improvements shall be paid for out of the income of the property: *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Lord Stamford's Estate*, 56 L. T. 484.

As to what are improvements within the Act, see sect. 25, *post*, p. 466. Ordinary repairs are not authorised to be paid for out of capital money: *Clarke* v. *Thornton*, *supra*.

(*m*) This sub-section in effect authorises the application of capital money in enfranchising copyholds. The enfranchisement of copyholds was held to be a proper mode of applying money paid into Court under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18): *Re Cheshunt College*, 3 W. R. 638; *Dickson* v. *Graham*, 25 L. J. Ch. 588. Enfranchisement.

(*n*) Sect. 65 of the Conveyancing, &c., Act, 1881 (44 & 45 Vict. c. 41), provides for the enlargement of long terms (of originally not less than 300 years, of which 200 years or more are unexpired) held at nominal rents into estates in fee simple. Enlargement of terms.

Powers—The Settled Land Acts.

form prescribed by sect. 24 (2) *post*, p. 465, will not merge the leasehold interest in the fee, inasmuch as the former interest is usually vested in trustees; and a merger might result in changing the course of devolution of the leasehold interest. Express provision with regard to this point should be made in the settlement, where such an application of capital money is to be contemplated: see Vaizey on Settlements, 690.

Sect. 21 of the Act of 1882 continues as follows:—

"(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

"(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

"(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (*o*):

(*o*) The words "or empowered to give an absolute discharge" are not in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), nor in the Settled Estates Act, 1877, sect. 34: see *Re Wright's Trusts*, 24 Ch. D. 662; and see *Re Harrop's Trusts*, 24 Ch. D. 717, where purchase-money of lands taken by a public company was ordered to be paid out to trustees of a settlement appointed under this Act: see also *Re Ward's Estates*, 28 Ch. D. 100; *Re Duke of Rutland's Settlement*, 31 W. R. 947.

Disentailing deeds.

In a case arising under the former Act, it was held by *Malins*, V.-C., that it is not necessary for a tenant in tail to execute a disentailing deed in order to entitle him to have the proceeds of sale of settled estate paid to him out of Court: *Re Row*, L. R. 17 Eq. 300; and *Re Wood*, L. R. 20 Eq. 372. But in *Re Broadwood*, 1 Ch. D. 438, *Jessel*, M.R., required a disentailing deed to be executed; and this view was confirmed by the Court of Appeal in *Re Reynolds*, 3 Ch. D. 61. An affidavit of no incumbrances will be required: *Thornhill* v. *Milbank*, 12 W. R. 523; *Williams* v. *Ware*, W. N., 1888, p. 82.

Payment out to trustees of settlement.

It is within the discretion of the Court whether or not it will order payment out of capital money to the trustees of the settlement under this sub-section: *Re Smith, Ex parte London & N. W. Rail. Co.*, 40 Ch. D. 386, where the Court of Appeal doubted

"(x.) In payment of costs, charges, and expenses (*p*) of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act: Powers—The Settled Land Acts.

"(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder."

Sect. 22. "(1.) Capital money arising under this Act shall, in order to its being invested or applied (*q*) as aforesaid, be paid either to the trustees of the settlement or into court (*r*), at the option of the tenant for life (*s*), and shall be invested or applied Regulations respecting investment, devolution, and income of securities, &c.

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the decision in *Re Hobson's Trusts*, 7 Ch. D. 708, that trustees of a will with power to sell were persons "absolutely entitled" within sect. 69 of the Lands Clauses Consolidation Act. But where money has been paid into Court under the option conferred on tenants for life by sect. 22, the Court will not order payment out to the trustees of the settlement as persons empowered to give an absolute discharge under sect. 40: *Cookes* v. *Cookes*, 34 Ch. D. 498.

(*p*) The charges of auctioneers for preparing an elaborate report and valuation of an estate preparatory to the sale thereof by a tenant for life are not such costs, &c., as to be payable out of capital money under this sub-section: *Re Eyton's Settled Estates*, W. N. 1888, p. 254. The costs of the concurrence in the sale of the mortgagees of the tenant for life, and also proper auctioneer's charges, have been allowed: *Re Beck, Re Cartington Estate*, 24 Ch. D. 608. So also the costs of an application for appointment of trustees of the settlement: *Re Greenville Estate*, 11 L. R. Ir. 138. Costs.

(*q*) As to the distinction between the "investment" and "application" of capital money under sects. 21, 22, see the observations of *Lindley*, L. J., in *Re Duke of Marlborough, Duke of Marlborough* v. *Marjoribanks*, 32 Ch. D. at p. 10.

During the time while the money arising from the sale of heirlooms remains uninvested or unapplied, or while it is invested pending realization and application under sect. 22, it bears the impress of the chattels sold, and will devolve as they would have devolved: per *Lopes*, L. J., ibid. at p. 13.

(*r*) If there are no trustees of the settlement, the money must be paid into Court: *Re Countess of Dudley's Settlement*, 35 W. R. 492.

(*s*) The option must be exercised once for all: *Cookes* v. *Cookes*, 34 Ch. D. 498.

Where it is intended that the purchase-money is to be paid to the trustees, the deposit paid on the execution of the contract for sale should either be paid to them (in which case they should be made parties to the contract), or it should be deposited in the joint names of the vendor and purchaser, at their joint risk, in a bank. Payment to trustees.

By sect. 39 (1), it is provided that capital money arising under this Act shall not be paid to fewer than two trustees, unless

Powers — The Settled Land Acts.

by the trustees, or under the direction of the Court, as the case may be, accordingly.

"(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life (*t*), and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

"(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees (*u*).

"(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

"(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

"(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

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the settlement otherwise provides, and their receipt effectually discharges the payor: see sect. 40. Payment into Court exonerates the payor: sect. 46, sub-sect. 2, p. 485.

Direction of tenant for life.

(*t*) This provision enables a tenant for life to assume the whole power and responsibility with regard to the choice of investments, and to deprive the trustees of any voice in the matter, unless they see fit to apply to the Court under sect. 44, *post*, p. 481, to restrain the tenant for life from applying or investing capital money in a manner which they consider improper and detrimental to the inheritance. See, however, sect. 42, as to the protection of trustees from liability for not making such applications as they might make. The tenant for life must exercise his power as a trustee for the benefit of all parties interested under the settlement: sect. 53, *post*, p. 488.

(*u*) Where the purchase-money has been paid into Court, the Court will not pay it out to the trustees under sect. 2 (ix.) as persons enabled to give a discharge under sect. 40: see *Cookes* v. *Cookes*, 34 Ch. D. 498.

"(7.) Those securities may be converted into money, which shall be capital money arising under this Act."

Powers — The Settled Land Acts.

The effect of clauses 5 and 6 of this section is, that the income of the investments goes as the rents of the land, if not sold, would have gone; and the capital devolves to the remainderman and others coming in under the settlement, as if there had been no sale; in other words, the capital is treated for that purpose as land, and not as money.

Devolution of money as land.

In framing a settlement, if it should be considered that other modes of investing and applying capital moneys, in addition to those authorised by this section, should be permitted, an express provision to that effect may be inserted in the settlement.

Sect. 23. "Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorises the same.

Investment in land in England (*x*).

Sect. 24. "(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

Settlement of land purchased, taken in exchange, &c.

"(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging (*y*).

"(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age go as freehold land conveyed as aforesaid would go (*z*).

(*x*) So, also, settled land in England may not be given in exchange for land out of England, in the absence of express authority in the settlement: see sect. 4 (8), *ante*, p. 450.

(*y*) As to multiplication of charges, see *Hindle* v. *Taylor*, 5 De G. M. & G. 577.

(*z*) The effect of this clause is, that if an infant *quasi* tenant in

Powers—The Settled Land Acts.

"(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein has theretofore been released, on the occasion and in order to the completion of a sale, exchange, or partition.

"(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

"(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

"(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land."

VI.—Improvements.

Improvements with Capital Trust Money.

Description of improvements authorised by Act (*a*).

Sect. 25. "Improvements authorised by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any

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tail of leaseholds leaves issue inheritable under the entail, such issue will take, but if he dies without such issue, then the leaseholds will pass to the remainderman. The corresponding proviso in sect. 4 of the repealed Act, 23 & 24 Vict. c. 145, did not contain the concluding words of this section, directing the leaseholds to go over as freeholds.

As to the history of the doctrine of *quasi* entails, see the judgment of *Lord St. Leonards*, C., in *Allen* v. *Allen*, 2 Dr. & War. 337; and as to the construction of dispositions in *quasi* strict settlement, see *Foley* v. *Burnell*, 1 Br. C. C. 274.

(*a*) The Improvement of Land Act, 1864, sect. 9, authorised, subject to the approval of the commissioners, the execution of the improvements specified in clauses i.—xiii. of this section; also those in clause xv. as regards agricultural purposes. The other improvements here specified are now authorised for the first time. By sect. 30 of this Act, *post*, p. 475, the enumeration of improvements in sect. 9 of the Improvement of Land Act, 1864, is extended so as to comprise all improvements authorised by this Act.

Ornamental improvements.

It is to be observed that the tenant for life is not by this Act empowered to make ornamental improvements (except public

Powers—The Settled Land Acts.

of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely:—

"(i.) Drainage, including the straightening, widening, or deepening of drains, streams and watercourses:

"(ii.) Irrigation; warping (*b*):

"(iii.) Drains, pipes and machinery for supply and distribution of sewage as manure:

"(iv.) Embanking or weiring (*c*) from a river or lake, or from the sea, or a tidal water:

"(v.) Groynes; sea walls; defences against water:

"(vi.) Inclosing; straightening of fences; re-division of fields:

"(vii.) Reclamation; dry warping:

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gardens, &c., in connection with building undertakings), nor have trustees generally power to do so: *Bridge* v. *Brown*, 2 Y. & C. Ch. Ca. 181. But where a tenant for life, under a will, had expended large sums in completing the erection of a mansion which had been begun by the testatrix and left unfinished at her death, it was held that the mansion ought to be completed, and a reference was directed to ascertain what money had been properly expended thereon: *Dent* v. *Dent*, 30 Beav. 363. And by the Limited Owners' Residence Act, 1870 (33 & 34 Vict. c. 56), as amended by the Act of 1871 (34 & 35 Vict. c. 84), it is provided that the erection of a mansion house and appurtenances suitable to the estate as a residence for the owner thereof, and the improvement of, and addition to an existing mansion house, or of or to a house capable of being converted into a suitable mansion house, shall be deemed to be improvements within the meaning of the Improvement of Land Act, 1864; and by sect. 4 of the Act of 1870, a sum not exceeding two years' net rental of the estate may, subject to the approval of the commissioners, be charged thereon for the purpose of erecting a mansion house, &c.

Repairs.

Nothing in this section authorises the application of capital to defraying the expenses of mere repairs, however necessary or permanent: *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Earl of Stamford's Estate*, 56 L. T. 484. As to the obligations of a tenant for life with regard to repairs generally, and in particular to the maintenance of improvements, see note to sect. 28, *post*, p. 473.

Warping.

(*b*) "Warping" is enriching by overflowing with water let in from the sea: Webster, Dict.

Weir.

(*c*) A "weir" or "wear" is "a dam to shut up and raise water": Johnson, Dict. "A dam in a river to stop and raise the water for conducting it to a mill or for taking fish": Webster, Dict. The development of fisheries does not, however, appear to be contemplated as one of the improvements authorised by the Act. The Court has sanctioned the application of purchase money of settled estate to embanking a river, so as to protect an unsold part of the estate: *Re Leadbitter*, 30 W. R. 378.

Powers—The Settled Land Acts.

"(viii.) Farm roads; private roads; roads or streets in villages or towns:

"(ix.) Clearing; trenching; planting:

"(x.) Cottages for labourers, farm-servants and artisans, employed on the settled land or not (*d*):

"(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes (*e*):

"(xii.) Saw mills, scutch-mills (*f*), and other mills, water-wheels, engine-houses and kilns, which will increase the value of the settled land for agricultural purposes or as wood-land or otherwise:

"(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices (*g*), and other works and machinery for supply and distribution of water for agricultural, manufacturing or other purposes, or for domestic or other consumption (*h*):

(*d*) This will include the erection of dwellings for the working classes: see stat. 48 & 49 Vict. c. 72, s. 11 (1), *post*, p. 470.

(*e*) The Court has refused its sanction to the application of capital money towards the construction of a silo, regarding it as being at present of an experimental and speculative character: *Re Broadwater's Estate*, 33 W. R. 738. But see *post*, p. 470.

The building of an agent's house and labourers' cottages falls within this category: *Re Houghton Estates*, 30 Ch. D. 102.

Scutch-mill. (*f*) A "scutch-mill" is a mill for drawing out raw flax, and preparing it for sale to spinners and manufacturers.

Sluice. (*g*) A "sluice" is a lock or floodgate for letting out dammed-up water: Webster, Dict.

Reservoirs Act, 1877. (*h*) By the Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), s. 5, it is provided, that "the construction or erection of reservoirs or other works of a permanent character for the supply of water to persons residing or engaged in labour on the lands on which such works are situate, or on any other lands settled to the same uses, or for the more convenient or profitable user of such lands, or for the supply of water to any sanitary or other local authority or water company, or to any manufacturer, or other person, or for any one or more of such purposes, shall be deemed to be an improvement of land within the meaning of the ninth section of the Improvement of Lands Act, 1864," and accordingly, with the sanction of the commissioners, the cost of such works may be charged on the settled estate. By sect. 6, limited owners may enter into agreements for the supply of water under the Act to local authorities, &c., for terms of years, "provided that every such agreement be approved by the Inclosure (Land) Commissioners, and that no premium or benefit in the nature of a premium be reserved thereby by the land owner." By sect. 7, contracts may be entered into between authorised companies and landowners for

"(xiv.) Tramways; railways; canals (*i*); docks:

"(xv.) Jetties, piers and landing places on rivers, lakes, the sea or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

"(xvi.) Markets and market-places:

"(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land (*k*):

"(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making and other works necessary or proper in connection with any of the objects aforesaid:

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execution of reservoirs, &c., or for advances for that purpose; and by sect. 8, landowners are empowered to charge their estates with subscriptions for the construction of waterworks by a water company.

As improvements authorised by this Act must be made or executed "on or in connexion with and for the benefit of settled land," it would not appear that tenants for life are hereby empowered to construct reservoirs, &c., for the supply of water to local authorities or water companies; for that purpose recourse must be had to the Reservoirs, &c., Act of 1877.

See generally as to water supply under the Settled Land Act, 1882, *Re Bulwer Lytton's Will*, 38 Ch. D. 20.

(*i*) In the Improvements of Lands Act, 1864, sects. 78—89, are contained provisions empowering the commissioners to authorise the *charging* of settled lands with money subscribed for the construction of railways and canals, upon being satisfied that they will, when constructed and open for traffic, effect a permanent increase in the value of the lands.

(*k*) See sect. 16, which contains provisions with regard to the appropriation of land for streets, open spaces, &c., caused or required by the tenant for life to be made on, or in connection with a sale or grant for building purposes, or a building lease: the parts appropriated may be vested in trustees, and the conditions of the appropriation may be declared by enrolled deed. It appears to be open to doubt whether the provisions referred to apply to streets, &c., made under this section on land not sold, granted, or leased for building purposes. Streets &c.

By sect. 21 of the Settled Estates Act, 1877, the Court has power to order the expenses incidental to such works to be raised by sale or mortgage of, or a charge on, all or any part of the settled land. This Act does not authorise the raising of money for improvements by mortgage: see sect. 18, *ante*, p. 456.

Powers — The Settled Land Acts.

"(xix.) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines (*l*):

"(xx.) Reconstruction, enlargement or improvement of any of those works (*m*)."

Costs, &c., under Agricultural Holdings Act.

By the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), sect. 29, it is enacted that:—

"Capital money arising under the Settled Land Act, 1882, may be applied in payment of any moneys expended and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first or second parts of the schedule hereto (*mm*), as for an improvement authorised by the said Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under or in pursuance of this Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorised by the said Settled Land Act to be discharged out of such capital money."

Dwellings for the working classes.

And by the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), sect. 11 (1), it is enacted that:—

"The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act [*i.e.*, the Settled Land Act, 1882], shall, in addition to cottages for labourers, farm-servants and artisans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate."

Settled Land Act, 1882, s. 26.

The Settled Land Act, 1882, continues as follows:—

Mines.

(*l*) A tenant for life is, by sect. 6, *ante*, p. 450, empowered to grant leases for mining purposes, including the sinking of mines which have not previously been worked. By the application of capital money to making trial pits and executing other preliminary works, he will be enabled to open mines and sell or lease them as going concerns. This Act does not empower a tenant for life impeachable for waste to open mines in order to work them himself.

As to the right of a tenant for life without impeachment of waste to open mines, see *ante*, p. 394.

(*m*) The application of capital money to a new and improved system of drainage of a mansion house, and to the rebuilding of stables, has been sanctioned: *Re Houghton Estate*, 30 Ch. D. 102.

(*mm*) This schedule is set out, sub tit. "Leases," *ante*, Vol. III., pp. 333, 334; it will be observed that the formation of silos is expressly thereby authorised.

Powers — The Settled Land Acts.

Sect. 26. "(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the trustees of the settlement, or to the Court (*o*), as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

Approval by Land Commissioners of scheme for improvement and payment thereon (*n*).

"(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

"(i.) A certificate of the land commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

"(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

"(iii.) An order of the Court directing or authorising the trustees to so apply a specified portion of the capital money."

"(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement."

The operation of this section is not retrospective:

(*n*) This marginal note seems to be somewhat inexact. What this section does provide for is, "approval by trustees or Court of scheme for improvement, and application of money accordingly on certificate of Land Commissioners, &c." Marginal notes are not to be taken as part of the Act: *Sutton* v. *Sutton*, 22 Ch. D. 511.

(*o*) The scheme will necessarily be submitted to the Court when the capital money has been paid into Court, either at the option of the tenant for life, instead of to the trustees, under sect. 22 (1), *ante*, p. 463, or where there are no trustees of the settlement.

Powers—The Settled Land Acts.

Re Knatchbull's Settled Estate, 27 Ch. D. 349; 29 Ch. D. 588. It does not, of course, interfere with a tenant for life's exercise of any powers statutory or otherwise which he may have of executing improvements independently of this Act, so as to oblige him to submit a scheme in such a case. But if he desires the cost of any improvement to be paid out of capital moneys arising under this Act, the submission of a scheme is a condition precedent, and must be made before the commencement of any work in the nature of an improvement; and where this condition has not been previously complied with, neither the trustees nor the Court can apply capital money in recouping expenses incurred: *Re Hotchkin's Settled Estates,* 35 Ch. D. 41 (*p*).

But where, in carrying into effect a scheme of improvements which has been duly approved by the trustees or the Court, additional expenditure beyond the estimate on which the scheme was based has been incurred, such expenditure may be allowed out of capital money, if it was incurred for work incidental to the proper execution of the scheme which was substantially approved, and is not so excessive as to amount to the substitution of a different scheme: *Re Bulwer Lytton's Will,* 38 Ch. D. 20.

It would seem that on an application to the Court under this section, the trustees should appear separately, and not concur with the tenant for life: *Re Broadwater Estate,* 33 W. R. 738.

Concurrence in improvements.

Sect. 27. "The tenant for life may join or concur with any other person (*q*) interested in executing any improvement authorised by this Act, or in contributing to the cost thereof."

(*p*) In that case, *Cotton,* L.J., suggested a doubt whether there was jurisdiction to sanction improvements on land intended to be sold and not to be retained as part of the settled property; such a construction, which would prevent the expenditure of capital moneys on improvements likely to increase the selling value of the land, might be productive of serious inconvenience, and it is to be hoped that, on further consideration of the point, a decision may hereafter be made in favour of a more liberal construction.

(*q*) Person includes corporation. See sect. 2, *ante,* p. 447.

As to the powers of limited owners to contribute towards the

Powers — The Settled Land Acts.

Sect. 28. "(1.) The tenant for life, and each of his successors in title (*r*) having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe (*s*).

Obligation on tenant for life and successors to maintain, insure, &c.

"(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

"(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

"(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

"(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section,

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construction of railways, canals, and waterworks, by taking shares in companies, and charging the amount on the settled land, see the Improvement of Land Act, 1864, sects. 78—89, and the Limited Owners' Reservoirs, &c., Act, 1877, sect. 8; and see notes to sect. 25, *ante*, p. 466.

(*r*) The words "the tenant for life and each of his successors in title" here mean the tenant for life, or other limited owner, for the time being in possession of the settled land. See sect. 10 (2), *ante*, p. 451.

Successors in title.

(*s*) It is to be observed that the obligation to maintain, &c., imposed by this section on tenants for life, is confined to "improvements" effected with capital money under this Act. A tenant for life is generally under no obligation to execute repairs of the settled property: see *ante*, pp. 394 *et seq.*

Obligation to repair.

As to the powers and proceedings of the commissioners with regard to insurance and maintenance of buildings erected as improvements, see Improvement of Land Act, 1864, ss. 72—77.

Powers — The Settled Land Acts.

or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act."

The above enactment is amended by sect. 2 of the Settled Land Acts Amendment Act, 1887 (50 & 51 Vict. c. 30), which enacts as follows :—

Section 28 of the Act of 1882, to apply to improvements within preceding section (*t*).

"Any improvement in payment of which capital money is applied, or deemed to be applied, under the provisions of the preceding section, shall be deemed to be an improvement within the meaning of section 28 of the Act of 1882, and the provisions of such last mentioned section shall, so far as applicable, be deemed to apply to such improvement."

Execution and Repair of Improvements.

Protection as regards waste in execution and repair of improvements.

Sect. 29. "The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land (*u*), and, without impeachment of waste by any remainderman or reversioner (*x*), thereon execute any improvement authorised by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament."

(*t*) *I.e.*, sect. 1 of the Act of 1887, set out *ante*, p. 460.

(*u*) Where for the purpose of effecting improvements it is necessary to enter and execute works upon adjoining lands belonging to other owners, proceedings to obtain authority for such entry must be taken, as directed by sect. 33 of the Improvement of Land Act, 1864.

(*x*) See as to waste, *ante*, pp. 387 *et seq.*

Powers — The Settled Land Acts.

Improvement of Land Act, 1864.

Extension of 27 & 28 Vict. c. 114, s. 9.

Sect. 30. "The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorised by this Act (*y*)."

VII.—Contracts.

Power for tenant for life to enter into contracts (*z*).

Sect. 31. "(1.) A tenant for life—

"(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

"(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

"(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration (*a*), but so that the lease be in conformity with this Act; and

"(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

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(*y*) As to improvements authorised by this Act, see sect. 25, *ante*, p. 466.

Notice to trustees.

(*z*) Notice is to be given to the trustees of the settlement, &c., a month previous to making a sale, exchange, partition, lease, mortgage, or charge. Sect. 45, *post*, p. 481.

Consideration.

(*a*) It is to be observed that no provision is here expressed with regard to consideration money paid for variation of the terms of a lease. Where moneys were paid in consideration of the waiver by trustees of restrictive covenants in grants of settled land made by them, it was held that the tenant for life was entitled to the benefit of the consideration: *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 660.

Powers — The Settled Land Acts.

"(v.) May enter into a contract for or relating to the execution of any improvement authorised by this Act, and may vary or rescind the same; and

"(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

"(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

"(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof (*b*).

"(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof."

VIII.—Miscellaneous Provisions.

Application of money in Court under Lands Clauses and other Acts (*c*).

Sect. 32. "Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the

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Application to Court.

(*b*) By sub-sect. (1) power is given to the tenant for life to vary or rescind contracts; but, under this sub-section, on his proceeding to exercise this power, or to enforce and carry into effect a contract as it stands, he or his successor, or *any person interested in the contract*, may apply to the Court to interfere in the matter. It is to be observed that the power of making an application is not expressly given to the trustees of the settlement, and it is perhaps doubtful if they are "persons interested in any contract"; a remainderman, however, clearly comes under this category.

Under the Settled Estates Act, 1877, s. 24, it has been held that a person whose interest under the settlement is remote cannot oppose a sale: *Re Spurway's Settled Estates*, 10 Ch. D. 230.

Payment into Court.

8 Vict. c. 18.

(*c*) As to payment into Court under the Acts above referred to, and the application of moneys so paid, see Lands Clauses Consolidation Act, 1845, s. 69, which must be read in connexion with the above section. Purchase money of lands belonging absolutely to a charity paid into Court under the Lands Clauses Consolidation Act, was held capable of being dealt with under this section as "money liable to be laid out in the purchase of land to be made subject to a settlement": *Re Byron's Charity*, 23 Ch. D. 171.

commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorised by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs (*d*) and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorised by this Act were authorised by the Act under which the money is in Court."

Application of money in hands of trustees under powers of settlement (*e*).

Sect. 33. "Where, under a settlement (*f*), money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act" (*g*).

(*d*) The costs are absolutely in the discretion of the Court: *Re Hanbury's Trusts*, 31 W. R. 784; see *Ex parte Mercer's Co.*, 10 Ch. D. 481; *Re Mills' Estate*, 34 Ch. D. 24.

(*e*) As to the duties and powers of trustees having money in their hands to be laid out in purchase of land, see *ante*, sub tit. PURCHASE DEEDS, Vol. V. p. 78 *et seq.*; see also Lewin or Trusts, ch. xix., p. 499.

(*f*) In *Re Mackenzie's Trusts*, 23 Ch. D. 750, the question was raised whether the term "settlement" in this section has not a wider signification than that given in the definition of the term contained in sect. 2 (1) of the Act (see *ante*, p. 439), so as to apply to money to be laid out in land, as well as to land and money derived from the sale of land; but *Chitty*, J., without determining this question, held that the trustees could invest in debenture stock under sect. 21 of the Act (*ante*, p. 458), money bequeathed to them in trust to lay it out in the purchase of land to be settled in strict settlement.

(*g*) "The section gives an option to the tenant for life to say that money shall be invested or applied as capital money; it is, in my opinion, an option to direct how it shall be invested or applied; the investment or application being within the various other provisions of the Act of Parliament. If the money had been in the hands of trustees, it appears to me the tenant for life might have said 'it is my option that these capital moneys shall be applied in improvements under the Act.' If he had done that, it would have been his duty to submit under the 26th section a scheme to the trustees": per *Chitty*, J., in *Clarke* v. *Thornton*, 35 Ch. D. at pp. 312, 313. Nor does it make any difference that the money is in Court, instead of being in the hands of trustees: *ibid*, at p. 314.

Powers—The Settled Land Acts.

Application of money paid for lease or reversion (*h*).

Sect. 34. "Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest (*i*), the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be."

Cutting and sale of timber, and part of proceeds to be set aside.

By sect. 35, a tenant for life, although impeachable for waste in respect of timber, may, with the consent of the trustees or under an order of the Court, cut and sell timber which is on the settled land ripe and fit for cutting, the net proceeds to be apportioned, three-fourth parts to be set aside as capital money and one-fourth to go as rents and profits (*k*).

Proceedings for protection or recovery of land settled or claimed as settled.

Sect. 36 confers on the Court the new power of approving and charging the settled land, with the costs, charges or expenses of any proceedings "taken

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(*h*) As to fines taken on a grant of a lease under this Act, see note (*g*), *ante*, p. 444. As to consideration for acceptance of surrender, see note (*n*), *ante*, p. 454.

(*i*) This section and sect. 74 of the Lands Clauses Consolidation Act, 1845, are similar enactments; and, where the facts are similar, decisions on the last named section are authorities on this: *Cottrell* v. *Cottrell*, 28 Ch. D. 628; see *Re Wilkes' Estate*, 16 Ch. D. 597; see also sect. 37 of the Settled Estates Act, 1877, where the power is given to the Court alone.

(*k*) The effect of this section has already been fully considered in the present volume in treating of the rights of tenants for life to fell timber, *ante*, pp. 389 *et seq.* This section entitles the tenant for life in certain circumstances to sever trees from the soil, but until severed they remain part of the inheritance, and if the tenant for life sells the settled land including the timber, the price of the timber to be fixed by valuation, the price when fixed is an addition to the purchase money, and forms part of the capital money payable to the trustees, and the tenant for life has no right to the one-fourth under this section: *Llewellin* v. *Williams*, 37 Ch. D. 317. Compare sect. 11 as to mines; and see *Re Ridge, Hellard* v. *Moody*, 31 Ch. D. 504.

or proposed to be taken for protection of settled land, or for the recovery of land being or alleged to be subject to a settlement" (*l*). This section enacts as follows:—

Proceedings for protection or recovery of land settled or claimed as settled.

Sect. 36. "The Court may, if it thinks fit, approve of any action, defence, petition to parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement (*m*), and may direct that any costs, charges or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement" (*n*).

Sect. 37 is as follows (*o*):—

Heirlooms.

"Where personal chattels are settled on trust so as to devolve

(*l*) Proceedings before the Committee of Privileges of the House of Lords to establish claim to an earldom, the settled estates being limited to go with the earldom: held, proceedings for the protection of settled land within this section, and the costs were ordered to be paid out of the land: *Re Earl of Aylesford's Settled Estates*, 32 Ch. D. 162; cf. *Re Sir J. Carnac's Will*, 30 Ch. D. 136, and see sect. 47.

Protection of estate.

(*m*) This section virtually re-enacts the provisions with regard to proceedings for the protection of the estate which was contained in sect. 17 of the Settled Estates Act, 1877, which section is repealed by sect. 64 of this Act, *post* p. 497.

Costs.

(*n*) The Court may, if it sees fit, order the costs of bringing or defending an action for the protection of the estate to be paid out of the estate, although the sanction of the Court has not been previously obtained: *Re Earl de la Warr*, 16 Ch. D. 587, a case under the Settled Estates Act.

Trustees were held to be justified in paying costs incurred by the tenant for life in proceedings instituted to prevent the construction of a sewage farm so as to cause a nuisance to the estate, though the sanction of the Court to the proceedings had not been obtained: *Re Willan*, 45 L. T. 745.

For form of order authorising the costs of litigation for the protection of trust property to be paid thereout, see *Re Lord Rivers*, 16 Ch. D. 589 n.

Compromise.

As to compromise of actions with regard to trust property, see *Wiles* v. *Gresham*, 5 De G. M. & G. 770; *Ex parte Ogle*, L. R. 8 Ch. 711.

(*o*) This section was inserted in the Act during its consideration by the House of Commons, and was probably suggested by the sales of the Sunderland Library under the 43 & 44 Vict. (Private Act) ch. i., and of the pictures and other heirlooms subject to a settlement under another private Settled Estates Act of the year 1882.

Powers — The Settled Land Acts.

with land (*p*) until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

"(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested or applied (*q*), and otherwise dealt with . . . . . as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

"(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court" (*r*).

The question of the settlement of heirlooms generally will be considered later: see *post*, pp. 511 *et seq.*

This section confers on the tenant for life an entirely new power. Prior thereto the Court had no power to sell heirlooms, on the ground that such a course was convenient: *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635.

(*p*) Including incorporeal hereditaments, *e.g.*, a baronetcy: *Re Sir J. Carnac's Will*, 30 Ch. D. 136.

(*q*) See sections 21 and 22 for the modes of investment and application of capital money, and the remarks of *Lindley*, L.J., as to the distinction between "investment" and "application:" *Re Duke of Marlborough*, *Duke of Marlborough* v. *Marjoribanks*, 32 Ch. D. 10.

Money arising from sale of heirlooms was allowed to be applied in discharging incumbrances, without keeping alive the incumbrances for the benefit of an infant remainderman, who would have become absolutely entitled to the heirlooms on attaining twenty-one: *Duke of Marlborough* v. *Marjoribanks*, *ubi sup.*

(*r*) The Court has a discretion to exercise, and where the tenant for life attempted to sell the heirlooms for his own benefit, and there was nothing in the circumstances of the estate making a sale advisable, *e.g.*, if there were no incumbrances on it, the Court would probably refuse the order. See per Lord *Esher*, M.R., *ibid.* A sale was ordered in this case, and also in the cases of *Re Brown*, 27 Ch. D. 179; *Re Houghton Settled Estates*, 30 Ch. D. 102; *Re Sir J. Carnac's Will*, *ibid.* 136.

The Court should not take into consideration incumbrances effected by the tenant for life himself who applies for its sanction to a sale, per *Chitty*, J. in *Re Beaumont's Settled Estates*, 58 L. T., at p. 918; *e.g.*, where a tenant for life had to pay his wife an annuity under a separation deed. In that case the Court refused to sanction a sale of family pictures, &c., in a mansion house.

IX.—Trustees.

Powers—The Settled Land Acts.

Sects. 38 to 44 inclusive, contain provisions relating to trustees of settlements—the appointment of trustees for the purposes of the Act by the Court; the number of trustees to act; trustee's receipts; the protection of each trustee individually; the protection of the trustees generally; and the reimbursement of trustees.

These sections will be more conveniently discussed later, in treating of trustee clauses in real settlements: see *post*, pp. 518 *et seq.*

This part of the Act, however, contains two important sections, which will be here stated and considered as bearing on the subject of the exercise by tenants for life of their statutory powers.

Reference of differences to Court (*s*).

Sect. 44. "If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit."

Notice to trustees.

Sect. 45. "(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month (*t*) before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

"(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(*s*) For form of summons for a declaration under this section, see Rules, Form XX. An instance of such an application occurs in *Re Beck*, 24 Ch. D. 608; see also *Wheelwright* v. *Walker*, 23 Ch. D. 762.

(*t*) "Month" means calendar month: see stat. 13 & 14 Vict. c. 21, s. 4.

Powers — The Settled Land Acts.

"(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section."

It was decided by *Pearson*, J., in *Re Ray's Settled Estates*, 25 Ch. D. 464, that the notice required by this section was not a general notice of an intention "to make a sale or lease of all or any part of the settled estate at any time or times after the expiration of one month from the date of the notice, but must be a notice of a specific sale or lease which is contemplated at the time when the notice was given. But by sect. 5 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18), it is enacted as follows :—

Settled Land Act, 1884, s. 5.

"(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

"(2.) The tenant for life is, upon the request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

"(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

"(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

"(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act."

Several points with regard to the above enactments require careful consideration.

Meaning of "notice of general intention."

The first point is as to the meaning of the words "notice of a general intention" in sect. 5 (1) of the Act of 1884. Notwithstanding the suggestion of Mr. Vaizey (Settlements, Vol. I., pp. 713, 714) that the words may mean merely notice of an intention to make a particular attempt to sell, &c., all or any part of the settled lands, without mentioning any specified person, or any specified terms, it is submitted, having regard to the manifest leaning of the Courts towards liberal construction of these Acts, that it

Powers—The Settled Land Acts.

is now a sufficient compliance with the statutory requirements as to notice, if the tenant for life gives to the trustees of the settlement and their solicitor a notice of his intention to sell, &c., the settled lands, or any part thereof, at any time or times, if and whenever a favourable opportunity may occur (*u*).

It will, however, be prudent to renew the notice of general intention on the occasion of every appointment of a new trustee of the settlement, even though there may have been two trustees at the date of the original notice, inasmuch as notice is required to be given to *each* of the trustees, addressed to them severally: see sect. 45 (1) of the Act of 1882.

Notice of intention to mortgage, &c.

It is next to be observed that the amending enactment does not extend to mortgages and charges for enfranchisement, or equality of exchange or partition under sect. 18 of the Act of 1882 (*ante*, p. 456); the tenant for life must therefore still give specific notice, within the meaning of the decision in *Re Ray's Settled Estates*, of his intention before making such a mortgage or charge.

Particulars, &c., of intended dealings.

By sect. 5 (2) of the Act of 1884 the tenant for life is required, on the request of the trustees, and without any necessity for them to apply to the Court under sect. 44 of the Act of 1882 (*ante*, p. 481), to furnish them with particulars and information as to sales, &c., effected, in progress, or immediately intended. And it is conceived that, when a notice of general intention to make sales, &c., has been given, it is the duty of the trustees from time to time to require the tenant for life to give them such particulars and information.

Duty of trustees as regards improvident sales.

The Settled Land Acts do not expressly impose upon the trustees the duty, upon receipt of a notice, or of particulars and information as to sales, &c., of taking any steps with reference to the exercise or intended exercise by the tenant for life of his statutory powers; and, indeed, by sect. 42, trustees are

(*u*) For a form of such notice see *ante*, sub tit. "Notices," Vol. IV. p. 115.

Powers—The Settled Land Acts.

expressly protected from liability "for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do." But in *Wheelwright* v. *Walker*, 23 Ch. D. at p. 761, *Pearson*, J., said: "It is quite plain, from the whole scope of the Act, that the trustees are considered as having an important duty to perform; at all events I think it clear that even as regards a sale, they have this important duty to perform, that if a tenant for life attempted to commit what may be called a fraud, and proposed to sell the property for something infinitely below its real value, it would be the duty of the trustees to come to the Court and ask for an injunction to restrain the sale."

When notice must be given.

A notice given less than a month before a contract for sale, but more than a month before the day fixed for completion, is a sufficient compliance with the statutory requirements: *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 616; *Hatten* v. *Russell*, 38 Ch. D. 334.

Notice by committee of lunatic.

The committee of a lunatic cannot give a valid notice of intention to sell, &c., unless he has previously obtained the authority of the Court in Lunacy to do so: *Re Ray's Settled Estates*, 25 Ch. D. 464.

Notice to solicitor of trustees.

The notice must be given not only to each of the trustees but also "to the solicitor for the trustees." It may, in some cases, not be quite clear whether or in what manner this requirement is to be complied with; for it does not necessarily follow that, because a solicitor acts as such for a particular person in a particular matter, the solicitor is the agent of that person so as to bind him by accepting notices on his behalf: *Saffron Walden, &c., Building Society* v. *Rayner*, 14 Ch. D. 406.

Waiver of notice.

By sect. 5 (3) of the Act of 1884 the trustees may waive notice, either in any particular case or generally. The term "waiver," as distinguished from consent, seems necessarily to imply that the default which is to be waived may have been previously made. It is conceived that a tenant for life may enter into a contract for selling or otherwise dealing

with the settled lands, or any part thereof, without notice to the trustees, provided he can induce the trustees to waive notice at any time previous to the completion of the transaction, or even subsequently thereto, if the purchaser or other person dealing with the tenant for life is content to accept the tenant's undertaking that notice shall be waived, and his indemnity against the risk of the possible refusal of waiver on the part of the trustees.

A waiver may either be made in express terms or may be implied by any act amounting to a recognition of the validity of the transaction. Mere lying by, and witnessing a default or omission, is no waiver; some positive act must be done: *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78. It seems clear, however, that if the trustees, having received no notice of a sale or other transaction in progress, accept the consideration money paid to them by the direction of the tenant for life, and give a receipt for the same, that would, in the absence of fraud, be an effectual waiver of notice so as to give to the purchaser, or other person dealing with the tenant for life, a good title.

X.—Court; Land Commissioners; Procedure.

Procedure of Court.

Part XI. (ss. 46—49) deals with the applications to and the procedure of the Court, assigning by s. 46 (1) all matters within the jurisdiction of the Court under the Act to the Chancery Division, and providing (2) that payment of money into Court effectually exonerates therefrom the person making the payment; requiring (4) that on an application by the trustees of a settlement, notice be served in the first instance on the tenant for life; (6) Court to have full power and discretion as to costs; (10) where value below a certain limit jurisdiction to County Court; and s. 47 provides for payment of costs out of capital money or settled property; s. 48 constitutes the Inclosure Commissioners for England and Wales, the Copyhold Commissioners, and the Tithe Commissioners into one body called "The Land Commissioners for England," who by cl. (6) shall

Constitution of Land Commissioners.

Powers — The Settled Land Acts.

have for the purposes of any Act, public, local, personal or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864.

XI.—Restrictions, Savings, and General Provisions.

Powers not assignable; contract not to exercise powers void (*x*).

Sect. 50. "(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

"(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void (*y*).

"(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act (*z*).

"(4.) This section extends to assignments made or coming into

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(*x*) By sect. 52 of the Conveyancing Act, 1881, it is enacted that "(1) A person to whom any power, whether coupled with an interest or not, is given, may by deed release or contract not to exercise the power. (2) This section applies to powers created by instruments coming into operation before or after the commencement of the Act."

(*y*) The statutory powers are unaffected by the tenant for life's bankruptcy, but if the bankrupt refuses to exercise them, his trustee cannot exercise them in his stead for the benefit of the creditors and remainderman: *Re Mansel's Settled Estates*, W. N. 1884, p. 209.

(*z*) The Court of Appeal, upon an application made by a tenant for life for its consent to a sale of the mansion-house and park under sect. 15 of this Act (*ante*, p. 455), in a case where the tenant for life had mortgaged his life interest to its full value, refused to make the order without full information of the proposed sale, and without the consent of the mortgagees: *Re Sebright's Settled Estates*, 33 Ch. D. 429.

operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment."

Prohibition or limitation against exercise of powers void.

Sect. 51. "(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act, a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

"(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same."

"The object of this section is to strike at and defeat (so far as they might control the powers given by the Act) all provisions even if contained in existing settlements, which might be in their intention and substance prohibitory, obstructive, or penal, for the purpose of preventing alienations or other acts contemplated by the statute. I do not think it was intended to enlarge or alter the substance of any original limitation of a particular estate (not properly an estate for life) which might be lawfully in force when the Act came into operation": per Lord *Selborne, Re Hazle's Settled Estates*, 29 Ch. D. at p. 84; see also *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651.

This section does not prevent a life estate from being limited determinable on bankruptcy: *Re Levy's Trusts*, 30 Ch. D. 119; or on alienation: *Re Atkinson*, 31 Ch. D. 577. A restraint on anticipation

Powers—The Settled Land Acts.

does not prevent a married woman from exercising her statutory powers: see sect. 61 (6), *post*, p. 495. As to conditions as to residence, see *post*, pp. 503 *et seq.*

If there be a tenant for life, or a person with the powers of a tenant for life under the settlement, as regards the whole settled land, a direction in the settlement that trustees shall have the powers of a tenant for life will apparently be void under this section, it being impossible that the powers of a tenant for life can be vested at the same time in trustees and in the person who would otherwise be tenant for life: see per Sir *J. Hannen*, in *Re Clitheroe Estate*, 31 Ch. D. 138, 139.

Provision against forfeiture.

Sect. 52. "Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture."

Tenant for life trustee for all parties interested (*a*).

Sect. 53. "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by

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(*a*) See this section explained by *Chitty*, J., in *Cardigan* v. *Curzon Howe*, 30 Ch. D. at p. 539; and see *Re Duke of Marlborough's Settlement, Duke of Marlborough* v. *Marjoribanks*, 30 Ch. D. at p. 134, and on app. 32 Ch. D. at pp. 8, 11; and per *North*, J., in *Re Sebright's Settled Estates*, 33 Ch. D. 440.

The fact that the tenant for life will derive a benefit from the exercise of a statutory power is not of itself sufficient to prevent him from exercising the honest discretion given him by this section: *Re Lord Stamford's Estate*, 56 L. T. (N. S.) 484.

If the remainderman offers to buy the property at its full value he is entitled to an injunction to restrain the tenant for life from selling at a less price than has been offered by the remainderman, or from selling at all without notice to the remainderman, so as to enable the latter to make an advance in his offer if he should think fit: *Wheelwright* v. *Walker* (No. 2), 31 W. R. 912.

Purchase of settled land by tenant for life.

A tenant for life being in the position of a trustee under this Act, he cannot safely sell to himself any part of the settled land: see *Grover* v. *Hugell*, 3 Russ. 428; and see *ante*, sub tit. PURCHASE DEEDS, Vol. V., pp. 97 *et seq.* It will, however, be competent for him to apply to the Court under the Settled Estates Act, 1877, sect. 16, to authorize a sale of the land to him. The Court will not make an order to that effect without an inquiry: *Re Hilton*, W. N. 1866, p. 107. A power of sale vested in trustees, with consent of the tenant for life, may be properly exercised by a sale to the tenant for life: *Howard* v. *Ducane*, T. & R. 81; *Bevan* v. *Habgood*, 1 J. & H. 222; and see *Dicconson* v. *Talbot*, L. R. 6 Ch. 32.

him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

General protection of purchasers, &c.

Sect. 54. "On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith (*b*) with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act."

Exercise of powers; limitation of provisions, &c.

Sect. 55. "(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

"(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

"(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions, under this Act."

Saving for other powers.

Sect. 56. "(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

"(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settle-

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(*b*) It is to be presumed that a person dealing with a tenant for life, and having actual or constructive notice of the transaction being an abuse by the tenant for life of his statutory powers, is not to be deemed a person dealing in good faith so as to derive protection from this section. See as to constructive notice the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 3.

Powers—The Settled Land Acts.

ment or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act (*c*).

"(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenants for life, or of any other person interested, give its decision, opinion, advice, or direction thereon."

Settled Land Act, 1884, s. 6.

The provision as to the necessity for the consent of tenants for life contained in sect. 56 (2) of the Act of 1882 is modified and supplemented by sect. 6 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18), which enacts as follows :—

As to consents of tenants for life.

"(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

"(2.) In the case of every other settlement not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act.

(*c*) Sub-s. 2 is explained by *Pearson*, J., in *Re Duke of Newcastle's Estates*, 24 Ch. D. at p. 139, as meaning by the first half that, where a tenant for life desires to exercise the powers given to him under the settlement, or under the Act if those powers are more extensive, he may exercise the statutory power notwithstanding any restriction in the settlement; and by the latter part, that the trustees *cannot* exercise any power, not even an absolute power of sale given them by the settlement, without the consent of the tenant for life, even though such consent is not required by the settlement: see also *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Re Clitheroe Estate*, 28 Ch. D. 378; 31 Ch. D. 135; *Constable* v. *Constable*, 32 Ch. D. 237.

N.B.—The word in the section is "power." The consent of the tenant for life is not required to the performance by them of a trust, or direction to sell: *Taylor* v. *Poncia*, 25 Ch. D. 646.

"(3.) This section applies to dealings before, as well as after, the passing of this Act."

Powers — The Settled Land Acts.

Sect. 57. "(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

Additional or larger powers by settlement (*d*).

"(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement."

XII.—Limited Owners Generally.

Sect. 58. "(1.) Each person as follows shall, when the estate or interest of each of them is in possession (*e*), have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

Enumeration of other limited owners, to have powers of tenant for life.

"(i.) A tenant in tail (*f*), including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown (*g*), but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money

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(*d*) Any additional or larger powers given to trustees must not conflict with or prejudice the powers given to the tenant for life by this Act: see sect. 56 (2), *ante*, p. 489. As to what is to be deemed a conflict of powers, see the observations of *Bacon*, V.-C., in *Re Clitheroe Estate*, 28 Ch. D. at pp. 388, 391; and of *Hannen*, J., in the Court of Appeal, *S. C.*, 31 Ch. D. at p. 139; see also *Clarke* v. *Thornton*, 35 Ch. D. 307.

(*e*) The word "possession" here is to be read as in antithesis to "remainder" or reversion: *Re Atkinson*, *Atkinson* v. *Bruce*, 31 Ch. D. 577.

(*f*) As to the nature and incidents of an estate tail and how it may be barred, see Burton, Comp. Ch. 2, p. 205; and see *post*, pp. 521 *et seq.* Estate tail.

(*g*) Where estates tail in land with reversion to the Crown have been granted in recompense for services, the grantees are by 33 & 34 Hen. 8, c. 20, restrained from barring the entail even as against their own issue, and this restriction is expressly maintained by the Fines and Recoveries Act, sect. 18. Lands so granted will (with the exception mentioned in the text) be capable of being alienated or otherwise dealt with by the tenant in tail in possession for the time being under the power given to tenants for life by this Act. Reversion to the Crown. 3 & 4 Will. 4, c. 74.

Powers—The Settled Land Acts.

provided by Parliament in consideration of public services (*h*):

"(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event (*i*):

"(iii.) A person entitled to a base fee (*k*), although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

"(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent (*l*):

"(v.) A tenant for the life of another, not holding merely under a lease at a rent:

"(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumu-

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Estates granted for public services.

(*h*) The estates of the Duke of Marlborough (see 5 Ann, c. 3, and *Davis* v. *Duke of Marlborough*, 1 Swanst. 74), of the Earl Nelson (see 46 Geo. 3, c. 146; 53 Geo. 3, c. 134; 55 Geo. 3, c. 96), and of the Duke of Wellington (see 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28), are inalienable except for the life interest of the tenants for life in possession for the time being.

Executory limitations.

(*i*) Where a testator devised real estate to trustees with power to sell upon trust to pay the income to his wife for the benefit of his son till he should attain twenty-one, and then to the son in fee, with an executory gift over in the event of his death under that age; it was held that the statutory powers of a tenant for life under this Act were exerciseable on behalf of the infant by the trustees of the will: *Re Morgan*, 24 Ch. D. 114. And see as to issue contingently entitled on attaining twenty-one of a deceased child of a testator, *Re James' Settled Estates*, 32 W. R. 898.

As to executory limitations generally, and wherein they differ from springing or shifting uses, see Fearne, C. R. 390.

It was established by *Pells* v. *Brown* (Cro. Jac. 590), that under a gift to A. and his heirs, and if A. die without issue then over, A. took an estate in fee, subject to be defeated by the executory gift over in the event specified.

Base fee.

(*k*) A base fee is defined by the Fines and Recoveries Act, sect. 1, to mean "that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred."

(*l*) A person entitled to receive, if he shall so long live, the rents of a house payable by the lessee thereof during the continuance of the term under an ordinary lease is not a tenant for life within this clause: *Re Hazle's Settled Estate*, 29 Ch. D. 78.

Powers—The Settled Land Acts.

lation of income for payment of debts or other purpose (*m*):

"(vii.) A tenant in tail after possibility of issue extinct (*n*):

"(viii.) A tenant by the curtesy (*o*):

"(ix.) A person entitled to the income of land (*p*) under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not (*q*), or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event (*r*).

"(2.) In every such case, the provisions of this Act referring to

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(*m*) In *Re Clitheroe Estate*, 31 Ch. D. 135, a person was held to be a tenant for life in possession within the meaning of this sub-section, although his life estate was subject to a term of 1300 years limited to trustees upon trust to enter into and hold possession of the rents and profits, and to accumulate the same for payment of debts, "and not deliver the same to any person beneficially interested in any part thereof" until the trusts of the term should have determined. But where there is a disposition of the entire rents for a period and a postponement of the interest of the first taker until its determination, that first taker is not, during that period, "a person with the powers of a tenant for life" within the sub-section, *e.g.*, where there is a limitation to trustees in fee upon trust for a term of twenty years to accumulate the income of the settled estates and apply it in improving and managing the estate, and after the determination of that term to convey the estates to B. for life, B. is not, during the period of accumulation, within this sub-section: *Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 423.

Tenant for life after possibility, &c.

(*n*) If there be a gift of land in *special* tail, *i.e.*, to A. and the heirs of his body, by B. his wife, then on the death of B. without issue, A. becomes tenant in tail after possibility of issue extinct, and cannot bar the estate tail under the Fines and Recoveries Act; he is, however, not impeachable for waste: *Williams* v. *Williams*, 12 East, 209; and see Co. Litt. 28 b.

(*o*) As to tenancy by the curtesy, see *ante*, pp. 361 *et seq.* For the purposes of this Act, the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife: see the Settled Land Act, 1884 (47 & 48 Vict. c. 18), sect. 8.

(*p*) To ascertain whether a person is "entitled to income," the limitations of the settlement must alone be looked at, without any regard to the question whether or not under the particular circumstances any income is in fact recoverable: *Re Jones*, 26 Ch. D. 736.

(*q*) The words "expenses of management" must be read in a liberal sense: see per *Chitty*, J., in *Clarke* v. *Thornton*, 35 Ch. D. at p. 311; see also *Re Lord Stamford's Estate*, 56 L. T. 484.

(*r*) *E.g.*, on remarriage of a widow: see *Williams* v. *Williams*, 9 W. R. 888; or on ceasing to reside in the mansion-house: before sale under the Act: *Re Haynes, Kemp* v. *Haynes*, 37 Ch. D. 306, see *post*, p. 505.

Powers—The Settled Land Acts.

a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

"(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid."

XIII.—Infants; Married Women; Lunatics.

Infant absolutely entitled to be as tenant for life (*s*).

Sect. 59. "Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof."

Tenant for life, infant.

Sect. 60. "Where a tenant for life, or a person having the powers of a tenant for life under this Act is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders (*t*)."

(*s*) Infants whose interests are contingent and who are not entitled to the receipt of the rents and profits are not tenants for life within this section: *Re Horne's Settled Estates*, 39 Ch. D. 84; but see *contra*, *Re Powell*, W. N., 1884, p. 67.

Where two infants were absolutely entitled to shares in freeholds and copyholds, formerly partnership property, trustees were appointed for the purposes of this Act by the Court on the application of their mother as their next friend: *Re Wells*, W. N. 1883, p. 111; 48 L. T. 859; 31 W. R. 764.

(*t*) The provisions of sect. 45 with regard to serving notices on the trustees of an intention to exercise the powers of sale, &c., are of course inapplicable to an exercise of the statutory powers under this section.

Where there were no trustees of the settlement within the meaning of sect. 2 (8) and the guardians of an infant had obtained an order authorising them to exercise the powers of a tenant for life under this Act, it was held that it was not necessary to have trustees appointed under sect. 38 for the purpose of receiving notice: *Re Countess of Dudley and London and North Western Rail. Co.*, 35 Ch. D. 338. In such a case the purchase money must be paid into Court: *ibid.*

Where the Court appoints trustees under sect. 38 to sell an infant's land, it has jurisdiction to authorise the sale to be made out of Court: *Re Price, Leighton* v. *Price*, 27 Ch. D. 552.

Powers—The Settled Land Acts.

Sect. 61. "(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

Married woman, how to be affected.

"(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use (*u*), or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

"(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act (*x*).

"(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

"(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

"(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act."

This enactment is materially affected by and should be read in connection with the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which was passed later in the same session: see *ante*, pp. 132 *et seq.*

(*u*) The form of words usually employed by conveyancers to settle property in favour of a married woman as separate estate was "for her sole and separate use;" or the words "separate use" may be used alone, but the word "sole" has not a fixed technical meaning, and will not "*per se*" necessarily create a separate use: *Massy* v. *Rowan*, L. R. 4 H. L. 294. Any other expressions which clearly denote an intention to exclude the husband will effectually create a trust for separate use. See Lewin on Trusts, pp. 755 *et seq.*, and the cases there cited. Every estate for life acquired by a married woman since 1882 is held by her as a *feme sole* by virtue of the Married Women's Property Act, 1882.

Husband lunatic.

(*x*) As to dispensation with the concurrence of a husband who is a lunatic, see 3 & 4 Will. 4, c. 74, s. 91; and see sect. 62, note (*e*), *infra*.

A similar provision is contained in the Settled Estates Act, 1877, sect. 50; and in the Conveyancing Act, 1881, sect. 39, power is given to the Court, notwithstanding a restraint on anticipation, to bind the interest of a married woman where it appears to be for her benefit: see *ante*, p. 297.

Powers—The Settled Land Acts.

This section is fully discussed *ante*, sub tit. "Acknowledgments," Vol. I., pp. 212 *et seq.* No acknowledgment will be necessary of any deed executed by a married woman for exercising a power under this Act, for a married woman was always capable of exercising a power.

Married woman, infant.

If a married woman is an infant, then she has under sub-sect. (2) the powers of a tenant for life under this Act, which are exerciseable on her behalf by the trustees of the settlement, or other persons, as prescribed by sect. 60 of the Act.

Restraint on anticipation.

By sub-sect. (6) a married woman is empowered, notwithstanding a restraint on anticipation, to effect sales, exchanges, &c., of the settled land, or to grant leases thereof, or charge it for purposes authorised by the Act, and exercise other powers thereby given; but inasmuch as the capital moneys arising from any dealing with the settled land becomes subject to the trusts of the settlement (sect. 22, sub-sect. 5, *ante*, p. 464), the restraint on anticipation will attach to the interest of the married woman in the income arising from investment of the capital money, or from the leases granted, or otherwise under the Act. See further as to restraint on anticipation, *ante*, pp. 291 *et seq.*

Tenant for life lunatic (*y*).

Sect. 62. "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by

(*y*) It has been held that where an infant is of unsound mind the case falls within the ordinary jurisdiction of the Court: *Re Arrowsmith*, 6 W. R. 742; 4 Jur. N. S. 1122; *Beall* v. *Smith*, L. R. 9 Ch. 85; *Re Edwards*, 10 Ch. D. 605. See as to a lunatic tenant in tail, *Re Gaitskell*, 40 Ch. D. 416. The committee intending to exercise the powers of a tenant for life under this Act must previously obtain the authority of the Court: *Re Ray's Settled Estates*, 25 Ch. D. 464. Notice must be given to the trustees as in any other case of an intended exercise of the statutory powers: *Re Taylor*, W. N., 1883, p. 95; 31 W. R. 596.

By 18 & 19 Vict. c. 13, s. 1, the Lord Chancellor in matters of lunacy is enabled to empower committees of estates of lunatic tenants in tail to grant leases binding on their issue and the remainderman.

By the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 91, it was provided that the Court of Common Pleas (now the Queen's Bench Division of the High Court) in the case of a husband being a lunatic, whether so found by inquisition or not, may dispense

inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

Powers—The Settled Land Acts.

XIV.—Settlement by way of Trusts for Sale.

Sect. 63 of the Act of 1882 relates to settlements of land or any estate or interest in land settled by way of trust for sale. This enactment has been amended by sect. 7 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18). This subject has already been discussed, *ante,* pp. 228 *et seq.*

XV.—Repeals.

Sect. 64. "(1.) The enactments described in the schedule to this Act are hereby repealed (*z*).

Repeal of enactments in schedule.

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with his concurrence in any case in which his concurrence is required by that Act or otherwise, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery (now the Chancery Division) shall be protector of a settlement in lieu of the husband. In order to obtain the order of the Court it must be shown that the land is actually contracted to be conveyed: *Re Graham,* 13 W. R. 782. See also as to orders dispensing with concurrence of a lunatic husband, *Re Murphy,* 4 Man. & G. 635; *Re Turner,* 3 C. B. 166.

(*z*) The enactments repealed by this section are Parts I. and IV. of Lord Cranworth's Act (23 & 24 Vict. c. 145), being so much of the Act as is not repealed by the Conveyancing Act, 1881, sects. 17 and 18 of the Improvement of Land Act, 1864, and parts of sect. 21 of the same Act (except as regards Scotland), and sect. 17 of the Settled Estates Act, 1877. Part. I. (sects. 1—10) of Lord Cranworth's Act empowered trustees, with the consent of the tenant for life, to effect sales and exchanges of the settled estate, and to convey the same, and to apply the proceeds of sales, &c., in the purchase of other lands or in payment of incumbrances, and until purchase to invest at interest, and also to obtain renewals of settled renewable leaseholds. These powers are now superseded by the far more extensive powers of sale, &c., given to tenants for life directly by this Act. Part IV. contained general provisions, which are also now superseded by this Act.

Enactments repealed.

Section 17 of the Settled Estates Act, 1877, provided that the Court might sanction proceedings taken by trustees for the pro-

Powers—The Settled Land Acts.

"(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceedings or thing then pending or uncompleted; and every such action, proceedings and thing may be carried on and completed as if there had been no such repeal in this Act."

XVI.—Ireland.

Modifications respecting Ireland.

Sect. 65. "(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

"(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

"(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

"(4.) Any deed enrolled under this Act shall be enrolled in the Record and Writ Office of that Division (*a*).

"(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

40 & 41 Vict. c. 57.

"(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

40 & 41 Vict c. 56.

"(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction

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tection of the estate, and is virtually re-enacted by sect. 36 of this Act, which extends the power of sanction to "actions or proceedings taken or proposed to be taken for recovery of lands, being or alleged to be subject to the settlement."

(*a*) As to deeds enrolled under this Act for effectuating the dedication of settled land for streets, open spaces, &c., see sect. 16 of the Act, set out, *ante*, sub tit. "Leases," Vol. III., p. 37.

of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act. Powers — The Settled Land Acts.

"(8.) Rules and orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

"(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

"(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years."

6. Of Shifting Clauses.

Nature and Effect of Shifting Clauses.]—In many cases provisions are inserted in the settlement which have the effect of shifting the estates from the persons taking under the settlement on the happening of some contingency, *e.g.*, the accession of another estate, settled either by the same or another instrument, the succession to some title of honour, or the failure to comply with some condition imposed by the settlement, such as the neglect or refusal to assume and use, or the discontinuance of the user of, the name and arms directed by the settlement to be assumed and used, or the non-compliance with a condition requiring residence for a certain period in some particular mansion.

Shifting clauses are strictly construed.

These shifting clauses, as has been before stated, being applied for the purpose of determining existing and creating new uses, must be strictly construed, according to the well-known principle that an estate once vested cannot be divested "without the concurrence to the letter of the terms and conditions upon which the estate is to be divested": per Lord *Cairns* in *Collingwood* v. *Stanhope*, L. R. 4 H. L. at p. 61; and see *Re Catt's Trusts*, 2 H. & M. 46.

Succession to Title or Estate.]—In Butler's note to Coke upon Littleton, sub tit. "*Discontinuance*" (Co. Litt. 327a), five points deserving special atten-

Shifting Clauses.

tion in a clause shifting the estate on the accession to another, are mentioned :—

Event on which estate to shift.

1. "The event in which the shifting clause is to have effect should be accurately described."

Where estate taken out of settlement.

For, having regard to the rule previously stated, it has been held that if the estate, on the accession of which the shifting clause is directed to take effect, has once been fairly taken out of the settlement, so that, although in the event it may come back to the same person who would have taken it under the limitations of the settlement, and who would in that case by the operation of this shifting clause have been compelled to give up the estates he then held, yet if it come back not in the same condition or of the same amount, or if since the date of the settlement it has been charged or incumbered, so that its identity has been destroyed, or its value diminished, or if a portion has been subtracted from it, or it has come back under a different title, in any of these cases the shifting clause does not take effect: *Fazakerly* v. *Ford,* 4 Sim. 390 ; *Taylor* v. *Earl of Harewood,* 3 Hare, 372 ; *Harrison* v. *Round,* 2 De G. M. & G. 190, 203 ; *Meyrick* v. *Laws,* L. R. 9 Ch. 237.

Resettlement of estate—continuation of title made by settlement.

But if the estate has been resettled in such a way that there is practically a continuation of the title made by the settlement, and the next descendant takes substantially the same estate under the new settlement, then if the estate be undiminished in quantity the resettlement is held to be merely a modification of his original title ; and any diminution in the value of the estate, if caused for his benefit, will not prevent the operation of the shifting clause, inasmuch as he is considered to have merely anticipated his interest : see per Lord *Selborne,* C., *Meyrick* v. *Laws, ubi sup.* at p. 242, referring to *Harrison* v. *Round.*

The estate to be taken in the property so as to call the clause into operation.

2. "The clause should describe accurately *what estates or interests* the younger brother solely, or both the younger brother and his issue male, are to take in the family property, so as to give to the clause the effect of making the second estate shift from them."

Shifting Clauses.

3. "Equal attention must be observed in describing the person to whom the settlor wishes the second estate to devolve when the party accedes to the family estate."

The person to whom the shifted estate is to devolve.

As pointed out in Mr. Butler's note, a direction that on the accession of any subsequent tenant for life to the family estate, the second estate shall devolve to the person next entitled in remainder, might carry that estate to the son of the same tenant for life, or, when they are introduced, to the trustees to preserve the contingent remainders, which would be as a general rule contrary to the intention of the settlor, which is that the estate shifted shall not devolve to the trustees, or to the issue of the son from whom it has shifted, but shall vest in the next son.

Who to take the shifted estate if the person to whom it is limited is not in existence.

4. "The clause should also direct to whom the second estate should devolve if at the time of its shifting *the person to whom it is limited is not in existence*, but may afterwards come *in esse*, as where an estate is limited to the sons of I. S. (a person in existence) successively in tail male, with a clause directing that on the accession of any son of I. S. to a particular estate, the lands in settlement shall devolve to the next son of I. S., and while I. S. is living, and has one son only, that son accedes to the estate. It is proper to provide for this case by directing who is to be entitled to the estate while there shall be a possibility of a subsequent son, but the existence of such subsequent son shall be in suspense."

Reverter of shifted estate.

5. "In many cases it is necessary *to provide for the return of the property* to a person from whom it has been divested by the shifting clause."

Thus if Whiteacre be settled by a father strictly on his sons A., B., and C. successively for life, with remainder in tail, and Blackacre is settled on B. and C. in the same manner, with remainder to A. for life, with remainder to A.'s sons in tail male, with ulterior limitations to the collateral branches of the settlor's family, and with a clause divesting Blackacre from B. and C. and their respective issue male on their respectively acceding to Whiteacre, then if A. dies without issue male, B. would accede to

Shifting Clauses.

Whiteacre, and Blackacre would shift from him. If C. should die without issue male, Blackacre would devolve on the collateral branches. But it would not as a general rule be the intention that Blackacre should go to the collaterals to the exclusion of any of the settlor's own issue.

The shifting clause should be so framed as not to take effect unless C., or some issue male of his body were living on the accession of B. to Whiteacre; and it should also provide that if after the shifting of Blackacre to C., C. should die without issue male, Blackacre should again revert to B. and his issue male in accordance with the original limitations.

Name and arms clause.

Name and Arms Clauses.]—An example of a shifting clause, which frequently occurs in practice, is where a settlor limiting an estate in strict settlement requires the several persons taking under the settlement to use his name and bear his arms.

There is a distinction between this and the former shifting clause inasmuch as "in this case it generally is not the intention of the settlor that the issue shall be prejudiced by the non-compliance of his parent with the requisition annexed to his estate" (Butler, Co. Litt., *ubi supra*); whereas in the former clause the estate would, as a general rule, shift not only from the parent, but from his issue as well.

Time for assumption of name should be limited.

The clause, as generally drawn, directs every person becoming entitled as tenant for life or in tail to the possession or receipt of the rents and profits of the settled lands to assume and continue to bear or use (if he does not so already) the name and arms of the settlor. A time should be limited within which they are to be assumed, generally one year from the time of so becoming entitled, or, in the case of infants from their attaining majority; and if the husbands of females becoming so entitled are subjected to the same requisition, one year (if already married) from their wives becoming entitled, or (if not then married), from the date of the marriage. If no time is fixed the condition is treated as a condition subsequent, which may be

Shifting Clauses.

satisfied by the assumption at any time (*b*), and which, if the shifting clause be annexed to an estate tail, can be barred by a disentailing assurance, but if annexed to an estate in fee, unless so limited that the event must necessarily take effect within a life or lives in being, and 21 years afterwards the shifting clause will be void for remoteness; *Woodhouse* v. *Herrick*, 1 K. & J. 352; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266.

Whether name to be assumed in addition to or in lieu of family name.

The clause should specify (1) whether the name to be assumed may be additional to, and if so, whether it may precede, or is bound to follow the original surname of the person becoming entitled. It has been held that in the absence of any express direction such a condition is not satisfied by the assumption of the name, in addition to and after the original name: *D'Eyncourt* v. *Gregory*, 1 Ch. D. 441; or (2), whether it is to be substituted for the original name. It should also specify that the name to be assumed is to be used as a surname, otherwise it would appear that the condition will be satisfied by taking the name as a christian name, which would not generally meet the intention of the settlor: *Bennett* v. *Bennett*, *supra*, p. 296.

Name should be described as surname.

Separate clause for real estate and personal estate.

Where real and personal estate are settled by a will upon similar limitations a separate name and arms clause may be attached to the personal estate distinct from that attached to the real estate, so as to prevent the operation of a disentailing deed of the real estate: *Re Cornwallis, Cornwallis* v. *Wykeham-Martin*, 32 Ch. D. 388.

Residence.

Conditions as to Residence.]—In former times the estate has often been directed to shift over in the event of the person then entitled failing to comply with a condition requiring residence at a particular mansion.

Period of residence to be fixed.

The clause was required to fix a reasonable period

(*b*) And is not broken by ceasing to bear: *In re Farrer and Champion*, W. N. 1887, 202.

Shifting Clauses.

in each year during which this residence was to continue, otherwise such a direction was treated as too ambiguous to justify a forfeiture in the event of non-compliance: *Fillingham* v. *Bromley*, 1 Turn. & Russ. 530, where the direction was that the person becoming entitled "should live and reside on the estate called 'Juts.'"

Personal occupation, if required, to be directed.

In the event of a personal occupation being required it ought to be directed in express terms; for, in the absence of such a direction, it seems that the condition would be satisfied by the keeping up of the mansion as a residence always ready for the personal occupation of the party directed to reside, *e.g.*, by keeping a staff of servants in the house, horses in the stables, and by payment of rates imposed in respect of the house and grounds: see *Warner* v. *Moir*, 25 Ch. D. 605. In *Walcot* v. *Botfield*, Kay, 534, it was held upon the terms of the will that personal occupation was required under a direction to reside, but in the earlier part of the will a distinction had been drawn between the words "reside" and "keep up." See on this subject *Dunne* v. *Dunne*, 7 D. M. & G. 207.

Residence by day alone sufficient.

Residence by day alone and for any part of the day was held by *Wood*, V.-C., sufficient residence within a clause requiring personal occupation: *Walcot* v. *Botfield*, Kay, at p. 550.

Ignorance of condition.

Ignorance of the terms of a condition is no protection against forfeiture arising by breach of that condition: *Astley* v. *Lord Essex*, 18 Eq. 290.

How affected by Settled Land Act, s. 51.

But now, having regard to sects. 51 & 52 of the Settled Land Act, 1882, a clause requiring residence and forfeiting the estate in the event of non-residence will now be deemed void when annexed to the estate of a tenant for life or person having the powers of a tenant for life, as being a provision which puts him into a position inconsistent with his exercising the statutory power of sale; a tenant for life may therefore sell a property, including, provided he obtains the consent of the trustees or an order of the Court, the mansion house, &c., notwithstanding a clause of forfeiture on non-residence, and

Shifting Clauses.

he will be entitled for his life to the income arising from the proceeds of such sale: *Re Paget's Will*, 30 Ch. D. 161. But in the later case of *Re Haynes, Kemp* v. *Haynes*, 37 Ch. D. 306, *North*, J., held that such a restriction, although inoperative to prevent the exercise of any of the statutory powers by a tenant for life, had the effect of determining the interest of a tenant for life where the non-observance of the restriction preceded any attempted exercise of any statutory power.

7. Of Renewable Leaseholds.

Where leaseholds, renewable under covenant, by custom or in practice, are settled upon successive limitations, it was formerly necessary for provision to be made by the settlement, how and out of what fund the expenses incurred in such renewal, if made should be borne as between the successive takers.

Renewable leaseholds.

Such leaseholds are now but rarely met with, except in the case of some ecclesiastical leases, and inasmuch as tenants for life and trustees have, under the stat. 23 & 24 Vict. c. 124, large statutory powers of purchasing the reversion in such leases, and as the Ecclesiastical Commissioners now refuse to renew any leases of lands vested in them, the same necessity does not exist to so great a degree, especially having regard to the recent Trustee Act, 1888, sects. 10, 11 (*vide infra*, p. 508).

Apportionment of costs as between tenant for life and remainderman.

In the absence of any direction the Court apportions the expenses of renewal between the tenant for life and remaindermen, in the proportion of the benefits which they actually derive from such renewals, and the same rule applies to the payment of fines on admission to settled copyholds: *Playters* v. *Abbott*, 2 My. & K. 97, 108; *Jones* v. *Jones*, 5 Hare, 440; *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711; *Isaac* v. *Wall*, 6 Ch. D. 706.

No obligation on tenant for life to renew.

In the absence of any direction to renew, the tenant for life is not bound to renew: *White* v. *White*, 4 Ves. 32; 9 Ves. 561; *Stone* v. *Theed*, 2

Renewable Leaseholds.

B. C. C. 248; *Lawrence* v. *Maggs*, 1 Eden, 453; see Lewin on Trusts, 6th ed. 320.

Paramount trust to renew, and renewal impracticable.

Where there is a paramount trust for renewal, the intention being to benefit the successive holders, and a renewal is impossible, either by reason of a compulsory purchase of the property, as in *Re Wood's Estate*, L. R. 10 Eq. 572, or through the refusal of the Ecclesiastical Commissioners to renew, as in *Hollier* v. *Burne*, 16 Eq. 163, and other cases, the tenant for life is not entitled to the leaseholds in specie, or to the revenue fund (if any) directed by the settlement to be set aside; but the proper course is to sell the leasehold property so soon as a renewal is found to be impossible, and invest the proceeds in some authorised investment, notwithstanding the fact that the income payable to the tenant for life from such investment will be less than he derived from the leasehold in specie: *Re Wood's Estate, supra; Hollier* v. *Burne, supra; Maddy* v. *Hale*, 3 Ch. D. 327; *Re Barber's Settled Estates*, 18 Ch. D. 624.

Where Ecclesiastical Commissioners offer to sell reversion.

Where the Ecclesiastical Commissioners agree to sell the reversion, the trustees ought, where there is an express trust for renewal, to purchase the fee simple, provided of course that the price fixed by the Commissioners is a reasonable one: *Hollier* v. *Burne, supra;* see *Re Lord Ranelagh's Will*, 26 Ch. D. 590.

Statutory powers to raise money for purchase of reversions and renewal of ecclesiastical leases.

The Act to amend the Acts relating to the Ecclesiastical Commissioners (23 & 24 Vict. c. 124), by sect. 20 enables trustees and other persons having power to raise money for the renewal of leases or grants made by any ecclesiastical corporation to raise money for the purpose of purchasing the reversion of, or otherwise enfranchising the property comprised in such lease or grant, to apply the same accordingly.

And by sect. 35 power is given to trustees and persons having interests to charge monies paid for purchase of reversions or enfranchisements on the lands enfranchised.

Sect. 36 provides that wherever the estate and interest under any such lease or grant is vested in

Renewable Leaseholds.

trustees, and monies, securities, &c., are vested in the same trustees and on the same or like trusts, the trustees may, with the consent of the person for the time being entitled to the dividends of the monies and securities, or if there be no person capable of giving consent, or if consent be withheld, then with the approbation of the Court of Chancery, raise out of such monies, &c., sufficient for the purchase of the reversion or enfranchisement.

Sect. 37 authorises the sale or mortgage, with the approbation of the Court, of all or any part of the property comprised in such lease or grant, and other lands settled to the same or like uses, for the purpose of raising money for purchasing the reversion, or otherwise enfranchising such property.

Sect. 38 empowers trustees (who have no power of sale), with the like consent or with the approbation of the Court, to sell all or any part of leasehold estates held under any ecclesiastical corporation, the money to be invested and held on the trusts on which the leasehold property, if not sold, would have been held, and such investment might be made (with the approbation of the Court) in the purchase of other leasehold estates, whether under any ecclesiastical corporation or not.

By sect. 39, persons empowered to raise money for the purchase of the reversion may give lands in exchange for the reversion.

Lord Cranworth's Act, s. 8.

By Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 8, trustees of leaseholds for lives or years renewable under covenant, contract, custom, or by usual practice, were empowered, and, in some cases, directed to renew, and for that purpose to surrender any subsisting lease: but this section was directed not to apply to any case where by the terms of the settlement (or will) the person in possession for his life, or other limited interest, was entitled to enjoy the same without any obligation to renew the lease or to contribute to the expenses of renewing the same; and sects. 9 and 10 provided for the raising of the money.

This, and the other sections (comprised in Part I. of the Act), however, have been repealed by the

Renewable Leaseholds.

Settled Land Act, 1882, and have not been repeated by the latter Act.

The new Trustee Act, 1888 (51 & 52 Vict. c. 59), has, however, re-enacted the provisions of these repealed sections by sects. 10 and 11.

Trustees of renewable leaseholds may renew.

"10. It shall be lawful for any trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if he shall in his discretion think fit, and it shall be the duty of such trustee, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustee from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same, unless the consent in writing of such person is obtained to such renewal on the part of the trustee.

Power to trustee to raise money to meet fines on renewal of lease.

"11. In case any money shall be required for the purpose of paying for the renewal of any lease as aforesaid, it shall be lawful for the trustee effecting such renewal to pay the same out of any money which may then be in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he shall not have in his hands as aforesaid sufficient money for the purpose, it shall be lawful for the trustee to raise the money required by mortgage of the hereditaments to be contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject; and no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purpose aforesaid."

Provisions in settlement for renewing.

Where a renewal has been directed and is capable of being effected, if the settlement contains a provision for the expense of renewal by sale or mortgage of the estate itself, then the tenant for life loses the

Renewable Leaseholds.

rents of the part sold in the case of a sale, and keeps down the interest in the case of a mortgage. Where provision is made by means of the sale or mortgage of another estate, there the tenant for life of that estate is in a similar position: *Ainslie* v. *Harcourt*, 28 Beav. 313. Where the expenses of renewal are directed to be paid out of the rents and profits, the whole burthen is thrown on the tenant for life: *Solley* v. *Wood*, 29 Beav. 482; see per *Selwyn*, L. J., in *Bradford* v. *Brownjohn*, L. R. 3 Ch. at p. 715.

Principle of apportionment in absence of provision in settlement.

Where no provision is made by the settlement, there the principle of apportionment as between a tenant for life who has renewed out of his own monies and a remainderman is shown by the following example. Assume a lease for forty years of which twenty have expired, and it is desired to renew the lease for another twenty years, *i.e.* to buy a twenty years' reversionary lease and pay for it twenty years before it falls into possession. The way in which the fine payable is computed, is by ascertaining the value of the lease as a lease for twenty years in possession; the sum then paid down is not that value, but such a sum of money as invested and accumulated for twenty years will at the end of that time amount to the value of the lease in possession. If the tenant for life who is assumed to have paid that sum dies immediately before the reversionary lease comes into possession, he has derived no benefit from the renewed lease, but has purchased for the remainderman a twenty years' lease in possession. The remainderman must therefore pay for it according to its value, *i.e.* the sum paid twenty years before by the tenant for life with compound interest down to his death. After the death of the tenant for life, simple interest only is computed. Suppose the tenant for life had enjoyed the reversionary term for ten years, the remainderman would have to pay the amount to be appropriated for the remaining ten years with compound interest down to the tenant for life's death. See per *Wood*, L. J., in *Bradford* v. *Brownjohn*, L. R. 3 Ch. 713; see also *Nightingale* v. *Lawson*, 1 B. C. C. 440.

Renewable Leaseholds.

When no imperative trust for renewal.

In *Morres* v. *Hodges,* 27 Beav. 625, *Romilly,* M.R. (following a decision of *Grant,* M.R., in *Richardson* v. *Moore,* and of Lord *Eldon* in *Tardiff* v. *Robinson,* 27 Beav. 629), held that a renewal having become impracticable, a renewal fund which had been reserved by the trustees out of the annual rent for that purpose under a direction in the deed of settlement, belonged to the tenant for life absolutely; and see *Hayward* v. *Pile,* L. R. 5 Ch. 214, a case under a will. But in none of those cases was there an imperative trust for renewal. These last mentioned cases are all reviewed in the judgment in *Maddy* v. *Hall,* 3 Ch. D. at p. 339 *et seq.*

What constitutes imperative trust.

Upon the question whether the directions are positive in any particular case making it obligatory upon the trustees to renew, or whether they are simply of a permissive or discretionary character, a devise "upon trust if they shall think proper or advantageous to endeavour to renew," or a proviso "that it shall be lawful for them to renew from time to time as occasion may require and as they may think proper," has been held not to confer an option on the trustees, but to be an imperative trust to renew if they could do so on reasonable terms, the discretionary form being adopted so as not to place trustees, or the interests of the persons entitled, within the power of the lessor: *Mortimer* v. *Watts,* 14 Beav. 616; *Milsington* v. *Musgrave,* 3 Madd. 491; 5 Madd. 472.

Out of what funds the fines are payable.

Where there is a direction to raise the fines out of "the rents, issues, and profits" simply, the Court *may* be compelled, by the express language, to throw the fines upon the annual rents, but will lean strongly against such a construction; and where "out of the rents, issues, and profits, or by mortgage," the Court will hold the discretion given to the trustees to apply only to the temporary means of raising the fund, and will apportion the burthen according to the general rule: see Lewin on Trusts, 6th Ed., 324.

8. Settlement of Personal Estate to go with Realty.

It is often desired to make personal estate and personal chattels descend with the real estate limited in strict settlement to the successive holders of the real estate.

Settlement of chattels to accompany title.

A settlement may be made of chattels to accompany the devolution of a dignity within the limits allowed by law, per *Chitty*, J.; *In re Johnston, Cockerell* v. *Earl of Essex*, 26 Ch. D. 540; 53 L. J., Rep. (Ch.) 645. Lord St. Leonards on Property, p. 330: *Sackville West* v. *Lord Holmesdale*, L. R. 4 H. L. 543.

No entail in personal estate.

The law does not allow an entail to be created in personal estate, consequently if leaseholds, money or personal chattels be assigned to trustees to hold upon trusts corresponding with the limitations of the settled real estate, or in the case of personal chattels if they merely be directed to be held as heirlooms, which direction is enough of itself to annex them to the real estate, then, unless there be some restriction requiring the attainment of twenty-one years or the coming into possession of the settled estate, the leaseholds, or heirlooms will vest absolutely in the first tenant in tail of the real estate immediately upon his birth: *Foley* v. *Burnell*, 1 Br. C. C. 274, affirmed, 4 Br. P. C. 319; *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40; *Gosling* v. *Gosling*, 1 De G. J. & S. 1; *Christie* v. *Gosling*, L. R. 1 H. L. 279; *Harrington* v. *Harrington*, L. R. 5 H. L. 87.

In the absence of restrictions leaseholds or heirlooms vest absolutely in first tenant in tail on birth.

Tenant in tail not indefeasibly entitled.

And this rule will hold good notwithstanding that the tenant in tail be not indefeasibly entitled. Where the real estate, to which the heirlooms were annexed was limited upon trust for R. C. for life and afterwards for his sons successively in tail male, then upon trust for H. C. the eldest son of J. C. for life and afterwards for his sons successively in tail male and then upon trust for "the next eldest son of the said J. C. who shall survive the said H. C." for life and afterwards for "the first and other sons

Settlement of Personalty as Realty.

of the body of the said next eldest son of the said J. C. who shall survive the said H. C." successively in tail male, R. C. & H. C. both died without having married, G. C. answered the description of the next eldest son of J. C. who *survived* H. C." F. J. C. was the eldest son of G. C. but died in the lifetime of R. C. & H. C. an infant. Mr. Justice *Kay* held that notwithstanding that at the time of the death of F. J. C. it was uncertain whether G. C. would survive H. C. or whether R. C. or H. C. would have issue male the heirlooms vested absolutely in F. J. C. as first tenant in tail by purchase: *Re Cresswell, Parkin* v. *Cresswell*, 24 Ch. D. 102.

Selection of *persona designata.*

His Lordship then distinguished between that case and a case where some *persona designata* has been selected, *e.g.*, "the person who for the time being shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will": see *Hogg* v. *Jones*, 32 Beav. 45, where heirlooms were held not to vest absolutely in a tenant in tail whose estate although defeasible by the birth of a son of a preceding tenant for life was not in fact defeated, but did not come into possession during his lifetime by reason of his death before the life estate determined.

So a direction that certain chattels are "to go and be held and enjoyed with a particular title and honour so far as the rules of law and equity will permit, by the person for the time being actually possessed of the said title in the nature of heirlooms," would, if unqualified, give an absolute interest in the chattels to the first person who succeeded to the title and honours: *Tollemache* v. *Coventry*, 2 Cl. & F. 611; *Viscount Exmouth* v. *Praed*, 23 Ch. D. 158.

Leaseholds or personal estate once vested not divested.

The leaseholds or other personal estate when once absolutely vested in the tenant in tail will not be divested by reason of his death under twenty-one: *Harrington* v. *Harrington*, L. R. 5 H. L. 87, and consequently, on such an event, will pass to the next of kin of the tenant in tail, and the ownership of the personal estate will be severed from that of the settled real estate.

Settlement of Personalty as Realty.

To obviate this result it has been from early times the practice of conveyancers to introduce limitations suspending the absolute vesting of the personal estate in a tenant in tail until the attainment of twenty-one (*i*). Subsequently the limitation was slightly extended, and the vesting was suspended in case of death under twenty-one "*and* without issue" (*k*).

Suspension of vesting.

But a tenant in tail might attain twenty-one and die without ever coming into possession of the settled real estate, and if the personalty had vested in him on his attaining twenty-one there would be an immediate separation of realty from personalty.

Caution required in framing limitations.

It is necessary that the limitations should be so framed that while providing against the severance of the realty and personalty by the death of the tenant in tail under twenty-one, or without coming into possession (*l*), the suspense of absolute vesting be not prolonged beyond the period allowable by law, viz., a life or lives in being at the date of the limitation and twenty-one years afterwards.

Tenants in tail by purchase.

Therefore the restriction as to the attainment of twenty-one, or the coming into possession, should be

(*i*) The various steps taken in conveyancing to meet the difficulties that occurred by reason of the difference between personalty and realty are stated at length in *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40.

(*k*) It is better to omit the additional phrase "and without issue" or "without leaving issue inheritable under the entail," for having regard to the rule that makes personalty vest in the first tenant in tail, if such tenant in tail dies under twenty-one *leaving issue*, the event on which the absolute interest vested in such tenant in tail is directed to be divested does not occur, and that vested interest will pass, notwithstanding the existence of issue, to the next of kin. Whereas if the gift is made defeasible on the death of the tenant in tail (by purchaser) alone, the gift over takes effect and the property is tied up for at least one more generation: see Hayes & Jarman's Concise Forms of Wills, 9th ed., p. 410, n.

(*l*) The phrase in a will "estate tail in possession" does not necessarily mean "actual possession," but may be construed as meaning "vested estate tail," even though that estate be in remainder upon a subsisting life estate: see *Martelli* v. *Holloway*, L. R. 5 H. L. 532.

Settlement of Personalty as Realty.

confined only to tenants in tail taking by purchase under the settlement; this can be done either by confining it to a "tenant in tail by purchase" in express words, or to a child of any person made tenant for life by the settlement (*m*).

"So far as the rules of law and equity permit."

The use of the words "so far as the rules of law and equity will permit" will not validate a limitation which, as expressed, infringes the rule against perpetuities, and is consequently void. It has long ago been settled that the use of these words (in a gift by will), coupled with the circumstance that the testator has directed an inventory of the chattels to be made, or that the legal interest is left in the executors, will not alter the general rule or make the trusts executory: *Vaughan* v. *Burslem*, 3 Br. C. C. 101; *Rowland* v. *Morgan*, 2 Ph. 764; *Harrington* v. *Harrington*, L. R. 5 H. L. 87; *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40.

The meaning to be attached to these words is that "inasmuch as there is a difference between realty and personalty, you are to apply the limitations according to the quality of the property; and since the law will not permit personalty to go as an estate tail, when you get to such a limitation you must stop and give an absolute interest": per *Wood*, V.-C., *Lord Scarsdale* v. *Curzon*, 1 J. & H. at p. 54.

Distinction between "executed" and "executory" trusts.

A distinction is, however, to be drawn between "executed trusts," *i.e.*, where the author of the trusts has been "his own conveyancer," leaving nothing to be done but to convert the limitations given by him into legal estates (*n*), and "executory trusts," where he has only indicated the general nature of his intended disposition, leaving the intention to be carried into effect by a settlement to be prepared under the advice of counsel or by the

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(*m*) For several clauses used by the principal conveyancers for attaining the object desired with the necessary precautions against the infringement of the rule against perpetuities, see *Harrington* v. *Harrington*, L. R. 5 H. L. 87, 93, n.

(*n*) *Per* Lord Commissioner *Ashhurst* in *Foley* v. *Burnell*, 1 Br. C. C. at p. 285.

Court: *Lord Glenorchy* v. *Bosville*, Cas. temp. Talbot, 3; *S. C.*, Wh. & Tud. L. C. Eq. 1; *Egerton* v. *Earl of Brownlow*, 4 H. L. C. 210; *Jervoise* v. *The Duke of Northumberland*, 1 J. & W. at p. 570. In the latter case the words in question will be treated as authorising the Court to insert provisions protecting the property as far as possible.

Settlement of Personalty as Realty.

A mere direction to convey or settle upon certain trusts does not render those trusts executory in the ordinary acceptation of the words. In *Duke of Newcastle* v. *Lady Lincoln*, 3 Ves. 387, a father covenanted in the marriage settlement of his son to assign to the trustees certain leaseholds in trust for and for the benefit of such person and persons, and for such or the like estate and estates, and for such or the like ends, intents and purposes as were thereinbefore mentioned concerning the manors, &c., limited as aforesaid "as far as the law in that case would permit." The limitations of the realty were to the son (Lord Lincoln) for life, and to his first and other sons in tail, then to the covenantor's second son, Lord Thomas Pelham Clinton and his family in the same way with limitations over. It was held by Lord Loughborough, and subsequently by the House of Lords (sub nom. *Lady Lincoln* v. *Duke of Newcastle*, 12 Ves. 217), that the trusts being executory, limitations were to be implied suspending the vesting till twenty-one, and that consequently the leaseholds did not vest in the only son of Lord Lincoln, the first tenant in tail who survived his father but died an infant, but passed to the son of Lord Thomas who had attained twenty-one. The decree, as originally framed by Lord Loughborough, declared that the leaseholds ought to be settled in trust for the Duke of Newcastle (the eldest son of Lord Thomas but who was then an infant), but if he should die under the age of twenty-one without leaving issue male of his body living at the time of his death, then upon a similar trust for his brother with divers limitations over. On appeal to the House of Lords the order was varied by omitting all limitations subsequent to that to the Duke of Newcastle, who had then attained his ma-

Direction to convey or settle on certain trusts.

Lady Lincoln v. *Duke of Newcastle.*

Settlement of Personalty as Realty.

jority. But it will be observed that the decision of Lord Loughborough on the point of law was upheld, for had the trust been executed, instead of executory, the leasehold would have vested in the infant son of Lord Lincoln. See *Shelley* v. *Shelley*, L. R. 6 Eq. 540, for form of settlement directed by the Court under an executory trust. Where a trust is created to secure the devolution of chattels as heirlooms, limitations intended to take effect by way of postponement or defeasance of an absolute interest, must, like conditions subsequent, be certain in expression and operation, and it is essential for their validity that it should be ascertainable at any given moment whether the limitation has or has not taken effect: *Viscount Exmouth* v. *Praed*, 23 Ch. D. 158.

Form of settlement directed by Court under executory trust.

Bequest of plate to A., Earl of X., and his successors as heirlooms.

A bequest of plate or personal estate to "A., Earl of X., and his successors," or to Viscount N. and his heirs, Earls of A., to be held as heirlooms, or with the addition of the words "and to be enjoyed with and to go with the title," is not an executory trust which the Court can model, but a direct gift, and the articles bequeathed would vest absolutely in the person first succeeding to the title: *Rowland* v. *Morgan*, 2 Ph. 764; *Re Johnston, Cockerell* v. *Earl of Essex*, 26 Ch. D. 538. But such a bequest to trustees to hold and settle them to go with the title would be a good executory trust: *ibid.*

In the case of *Shelley* v. *Shelley*, L. R. 6 Eq. 540, *Wood*, V.-C., declared that a valid executory trust was created of family jewels under a bequest "to my nephew, J. S., to go and be held as heirlooms by him and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants as far as the rules of law or equity will permit," with a request to her "said nephew to do all in his power by his will or otherwise to give effect to this my wish as to these things so directed to go as heirlooms as aforesaid," and declared that under such trust J. S. was entitled to the enjoyment thereof for life, and that E. S., the eldest son of J. S., was entitled to the enjoyment thereof for

life, and upon his death the same would be held in trust for the eldest son of E. S., if living at the death of E. S., to become a vested interest in the son on attaining twenty-one, but if he should die in the lifetime of E. S., or after him under twenty-one leaving an eldest son born before the death of E. S., then in trust for such last-mentioned son to be a vested interest on his attaining twenty-one; and in case the said jewels should not become absolutely vested in any person under the limitations aforesaid, then (subject to the life interest of E. S.) in trust for J. S. absolutely.

Settlement of Personalty as Realty.

It will be observed that the jewels directed to be thus strictly settled were not limited by the will or by the settlement directed to be made by reference to the limitations of any real estate, but the V.-C. held that at any rate as regards family jewels, "which are just as much an object of anxiety for transmission in a particular direction as the land itself," that fact created no difficulty, whatever might be the case as regards money: *Green* v. *Ekins*, 2 Atk. 473.

A tenant for life of heirlooms will not be required to give security for the heirlooms, but only to sign an inventory, unless there be reason to suppose that the heirlooms will be in danger in his possession: *Temple* v. *Thring*, 56 L. J., Rep. (Ch.) 767; *Foley* v. *Burnell*, 1 Br. C. C. 274, 279.

Tenant for life not required to give security.

9. Trustee Clauses in Real Settlements.

The remarks which have been made in a former chapter (*ante*, pp. 334 *et seq.*), as to the statutory powers of trustees of personal settlements to give receipts and the statutory provisions for the indemnity and reimbursement of such trustees, apply equally to settlements of realty. Inasmuch, however, as in the case of real settlements, there are often one or more sets of trustees of terms in addition to the general trustees or "trustees of the settlement," it may be advisable to insert in such settlements express clauses providing who is to

Trustee Clauses.

exercise the statutory power of filling up vacancies which may occur in the several sets of trustees.

A clause should always be inserted in a real settlement declaring that the general trustees shall be trustees of the settlement for the purposes of the Settled Land Acts.

With regard to the appointment by the Court of trustees for the purposes of these Acts, the Settled Land Act, 1882 (45 & 46 Vict. c. 48), enacts as follows :—

Appointment of trustees by Court.

Sect. 38.—"(1.) If at any time there are no trustees of a settlement within the definition in this Act (*o*), or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act (*p*).

"(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement."

Number of trustees to act.

Sect. 39.—"(1.) Notwithstanding anything in this Act, capital-money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement autho-

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(*o*) See as to this *Wheelwright* v. *Walker*, 23 Ch. D. 752.

(*p*) The Court has refused repeatedly to appoint a tenant for life to be a trustee of the settlement for the purposes of this Act : see *Re Harrop's Trusts*, 24 Ch. D. 717 ; *Re Kemp's Settled Estates*, *ib.* 485. So also the solicitor of the tenant for life, though he had been appointed by a testator as trustee of his will : *Re Kemp's Settled Estates*, *supra* ; see also *Re Walker's Trusts*, 31 W. R. 716. The Court will not generally appoint two persons who are nearly related to each other : *Re Knowles' Settled Estates*, 27 Ch. D. 707. In *Re Morgan*, 24 Ch. D. 114, the mother of an infant tenant for life and another person, both being devisees in trust of the settled land, were appointed trustees for the purposes of the Act. See further as to who are fit persons to be appointed trustees, *ante*, sub tit. APPOINTMENT OF NEW TRUSTEES, Vol. II., pp. 20 *et seq.*

rizes the receipt of capital trust money of the settlement by one trustee (*q*). Trustee Clauses.

"(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being."

Sect. 40. "The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised." Trustees' receipts (*qq*).

Sect. 41. "Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default." Protection of each trustee individually.

(*q*) It is an established rule that money should not be paid out of Court to a sole trustee except under special circumstances: *Re Roberts*, 9 W. R. 758; and see *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19; *Re Renault*, 16 Jur. 233; *Re Dickinson*, 1 Jur. N. S. 724; *Re Ellison*, 2 Jur. N. S. 62; *Re Porter*, *ib.* 349. As to what is a sufficient authorisation in a settlement made before the Act: see *Garnett Orme's and Hargreave's Contract*, 25 Ch. D. 595. Sole trustee.

Rents and profits of settled lands may be paid to a single trustee, who is empowered to give valid receipts therefor: sect. 40.

By the Conveyancing Act, 1881, sect. 31 (3), it is provided, that "it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed;" the question therefore arises, whether, where a sole trustee was originally appointed, it can be considered that the "settlement otherwise provides," so as to allow of capital-money to be paid over to such sole trustee, and empower him to give an effectual receipt. See *Re Renault*, 16 Jur. 233, where a sole trustee was appointed, only one trustee having been originally appointed by the will creating the trust, and the estate being about to be wound up. In the absence of express judicial decision a purchaser or mortgagee could not be advised to pay over capital-money arising under this Act on the receipt of a sole trustee, unless the settlement expressly authorises such payment.

(*qq*) This power apparently extends to trustees appointed by the Court under sect. 38: see *Cookes* v. *Cookes*, 34 Ch. D. 498.

Trustee Clauses.

Protection of trustees generally.

Sect. 42. "The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease."

Effect of these sections.

These two sections are evidently framed with the intention of freeing tenants for life, when exercising their statutory powers, from interference on the part of their trustees; and in order to ensure this as far as may be, trustees are exempted from liability in respect of numerous specified acts and omissions which otherwise might involve breaches of trust with regard to the exercise of such powers. Trustees, however, would be justified in interfering, and indeed would apparently be bound to interfere, to prevent an improvident sale or other improper exercise of his powers by a tenant for life: see *Wheelwright* v. *Walker*, 23 Ch. D. at pp. 761, 762. By sect. 44 of this Act (*ante*, p. 481), trustees are empowered, if a difference arises between them and the tenant for life, to apply to the Court for directions respecting the matter in difference.

Trustee reimbursement.

Sect. 43. "The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them."

This section merely declares anew what is the existing doctrine with regard to the reimbursement of trustees: *Feoffees of Heriot's Hospital* v. *Ross*, 12 Cl. & F. 512.

CHAPTER VIII.

DISENTAILING ASSURANCES.—THE FINES AND RECOVERIES ACT.

	PAGE		PAGE
Freeholds	521	*Entailed Money*	535
Copyholds	524		
Protector of Settlements	525	*Statute of Limitations*	537
Exclusion of Equitable Jurisdiction of Court	533	*Quasi-Entails*	538

Disentailing Deeds.

For the purpose of disentailing settled estates, and thus releasing them from the fetters of a strict settlement, the execution of a simple disentailing assurance, which must be enrolled in the Chancery Division of the High Court of Justice, has been substituted by the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), for the more cumbrous process of levying a fine or suffering a common recovery.

Fines and Recoveries Act.

Under the old law the effect of a fine levied with proclamation by a tenant in tail was merely to bar the issue inheritable under the entail; and, accordingly, so long as such issue continued, the land would descend and be disposed of in the ordinary way, and the estates of those who claimed in remainder or reversion were for that time displaced and turned merely into rights. But where it was desired to acquire a clear fee-simple estate, discharged not only from the immediate estate tail but also from all estates and rights capable of taking effect after or in defeasance of the estate tail, it was necessary that the tenant in tail should suffer a common recovery which required the concurrence of the immediate freeholder.

Limited effect of fine.

Where recovery necessary.

Freeholds.]—By sect. 15 of the Fines and Recoveries Act, it is enacted that every actual (*a*) tenant

Freeholds.

(*a*) "Actual tenant in tail" means exclusively the tenant of

Interpretation of terms.

Disentailing Deeds.

Power after 31st December, 1833, to dispose of land in fee simple or for a less estate, saving the rights of certain persons.

in tail whether in possession, remainder, contingency, or otherwise, with certain exceptions (*b*) may, after 31 Dec., 1833, dispose of for an estate in fee simple or any less estate the lands entailed as against all persons claiming through his estate tail, and also as against all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

Mode of disposition by tenant in tail.

Every disposition made by a tenant in tail to effect this purpose must be by an assurance (not being a will) capable of passing an estate at law in fee simple absolute, but no disposition is to be of any effect unless made or evidenced by a deed, nor if resting on contract express or implied, whether for valuable consideration or not, although it be made or evidenced by a deed (s. 40).

Tenant in tail married woman.

If the tenant in tail be a married woman, whether entitled to her separate use or not, the consent of her husband, to her disposition will be necessary (*c*), and any deed executed by her for effecting the disposition, is to be acknowledged under s. 79 (s. 40).

Concurrence

And inasmuch as the power of disentailing is

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an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned into a right.

"Tenant in tail" means not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail, if the same had not been barred.

"Estate" extends to an estate in equity as well as at law, and to any interest, charge, lien, or incumbrancer in, upon, or affecting lands either at law or in equity, or money subject to be invested in the purchase of lands : see sect. 1.

(*b*) Viz., (1.) Tenants in tail *ex provisione viri*, under settlements made before the passing of the Act, except with the assent required by 11 Hen. 7, c. 20, *i.e.*, of husband during his life, and after his death of the heirs next inheritable to her, or of him or them that next after her death should have an estate of inheritance (sect. 16). The Act of Hen. 7 is now repealed, except as to lands comprised in settlements made prior thereto (sect. 17).

(2.) Tenants in tail restrained by Act of Parliament (sect. 18). See 34 & 35 Hen. 8, c. 20, and see Settled Land Act, 1882, sect. 58, 1 (i.), *ante*, pp. 491, 492.

(3.) Tenants in tail after possibility of issue extinct (sect. 18).

(4.) Heirs expectant in tail (sect. 20).

(*c*) The bankruptcy of the husband is no bar to his concurrence : *Cooper* v. *Macdonald*, 7 Ch. D. 288.

Disentailing Deeds.

statutory, this concurrence of the husband would seem still to be required notwithstanding the alteration of the law effected by the Married Women's Property Act, 1882 (*d*).

of husband since as well as before the Married Women's Property Act, 1882.

A restraint upon anticipation will not prevent a married woman enlarging her estate tail into an estate in fee simple : *Cooper* v. *Macdonald*, 7 Ch. D. 288.

Restraint on anticipation.

Sect. 40 requires the assurance to be one capable of passing an estate at law in fee simple absolute ; it must therefore be a conveyance *inter vivos*, and such a conveyance as, if the estate of the tenant in tail were an estate at law in fee simple, would pass such estate (*e*).

Conveyance *inter vivos* necessary.

A declaration of trust of entailed property is inoperative as an assurance : *Green* v. *Paterson*, 32 Ch. D. at p. 108. "It is not enough that the instrument is a deed unless it be adequate to pass the estate of the tenant in tail, considered as a legal fee simple, nor that it is an assurance adequate to pass such estate unless it be also a deed :" Hayes Intr. Conv. (5th Ed.) Vol. I. p. 155.

Disentailing of equitable estates tail.

Prior to the Act equitable estates tail and remainders were barred by an equitable fine or recovery, in which the same formalities were observed as in the legal proceeding. Consequently where an equitable recovery was suffered the owner of the equitable interest in the immediate freehold, the person who made the tenant to the præcipe, was bound to convey it to the intended tenant, although the whole proceeding which took place in the Court of law was purely formal and void at law (*f*). So under the Act, if the estate tail be equitable the tenant in tail must be treated as if he had a legal estate in fee simple, and must convey accordingly.

(*d*) See *ante*, pp. 132, *et seq.*

(*e*) The forms of conveyance at the date of the Act for passing an estate in fee in possession (and consequently an estate tail in possession), were feoffment (evidenced by deed), lease and release, or bargain and sale ; for an estate in fee in remainder (and consequently an estate tail in remainder), or where the subject was incorporeal (*e.g.*, advowson) a deed of grant.

(*f*) See judgment of *Fry*, L.J., in *Bankes* v. *Small*, 36 Ch. D. 716 ; *Re Dudson's Contract*, 8 Ch. D. 628, 632.

Disentailing Deeds.

Enrolment of disentailing assurance.

The Act further (sect. 41) renders inoperative every assurance though otherwise effectual for disposing of the estate, unless it be enrolled in Chancery (now the Chancery Division of the High Court) within six months from the date of execution. An exception however is made in the case of a lease not exceeding twenty-one years at a rack rent or not less than five sixths of a rack rent.

Time at which disentailing deed takes effect.

Every enrolled deed operates and takes effect as from the date of its execution, with the exception that every such deed shall be void as against a purchaser for valuable consideration claiming under a deed although subsequently executed if the first enrolled: sect. 74.

Mode of disentailing copyholds.

Copyholds.]—Where the lands entitled are copyhold if the estate of the tenant in tail be legal, the disposition under the Act is to be made by surrender (50), if the estate be equitable, then either by surrender, or by deed in the same manner as if they had been of freehold tenure, sects. 50 and 53.

Entry on Court Rolls substituted for enrolment.

By sect. 54, entry on the Court Rolls of the surrender or memorandum or copy thereof, or of the deed of disposition as the case may be is substituted for enrolment in Chancery, and having regard to the provisions in sects. 50 and 53, that the previous provisions in the Act so far as circumstances and the different tenures will admit shall apply to lands held by copy of Court Roll and to sect. 54 it has been decided that a disentailing assurance by an equitable tenant in tail of copyholds, if not entered on the Court Rolls of the manor within six months after execution, is void: *Honywood* v. *Foster*, 30 Beav. 1; *Gibbons* v. *Snape*, 1 De G. J. & S. 621; *Green* v. *Paterson*, 32 Ch. D. 95, and the same limitation of time will apply to a surrender or memorandum in the case of a legal estate tail in copyholds. The provision at the end of sect. 53 giving priority to a subsequent assurance entered on the Court Rolls over an assurance by an equitable tenant in tail so entered, is apparently meant to apply during the six months allowed for enrolment: *Gibbons* v. *Snape, supra,* at p. 632.

Disentailing assurance by equitable tenant in tail void if not entered on Court Rolls within six months after execution.

Disentailing Deeds.

Protector of Settlement.]—In order to retain to some extent the check which the old law placed upon improvident dispositions by the tenant in tail by making the concurrence of the immediate owner of freehold in the lands essential to a common recovery, the Act instituted an office, called a protectorship of the settlement.

The owner of the first existing estate under a settlement prior to the estate tail under the same settlement, to be the protector of the settlement.

Sect. 22 provides that "If at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands or any of them under the same settlement any estate for years determinable on the dropping of a life or lives (*g*), or any greater estate (not being an estate for years) prior to the estate tail (*h*), the owner of the prior estate or the first of such prior estates, if more than one, shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting. And it is immaterial that the prior estate has been charged or incumbered to its full value by its owner or the settlor, or absolutely disposed of by the owner, or by his bankruptcy or insolvency, or any other act or default.

Incumbrances on, or alienation of, prior estate.

Estate by the curtesy, &c.

An estate by the curtesy in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement and an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement, within the section (*ibid*).

Protector is beneficial owner of prior estate.

The person who under sect. 22 is protector as being "the owner of the prior estate" is the substantial owner of the estate, whether equitable or legal, that is the person beneficially entitled to the rents and profits of the entailed estate, the *cestui que* trust, not the trustee: *Re Dudson's Contract*, 8 Ch.

(*g*) To meet a common form of limitation prior to the Act, an estate to A. for 99 years if he should so long live, with remainder to his first and other sons in tail, under the old law A. was not a necessary party to concur in the recovery: see *Bell* v. *Holtby*, 15 Eq. 189.

(*h*) This estate tail need not be the estate tail in possession, and consequently an estate tail in possession may be the prior estate constituting the protector to the estate tail in remainder: *Re Blewitt*, 6 D. M. & G. 187.

Disentailing Deeds.

D. 628 ; see Lord St. Leonards' R. P. Stat., 1st Ed., pp. 220, 222.

Life estate subject to a term of years.

Where freehold estate was devised to trustees for a term of ninety-nine years if the testator's son M. should so long live upon trust to manage and pay 250*l.* to M. for his life, and subject thereto to pay the surplus rents and profits to the person for the time being entitled in reversion immediately expectant upon the term to the rents and profits, and upon the expiration or sooner determination of the term the estate was devised to the use of the testator's son H. for life with remainder to his sons in tail male, H., not the trustees, was held to be the protector under the settlement: *Re Ainslie, Ainslie* v. *Ainslie,* 55 L. J. Rep. (Ch.) 8.

Equitable estate vested in trustees.

So where an estate, which was itself equitable, the legal estate outstanding in a mortgagee, was by a will made in 1803 limited to trustees upon trust for a married woman for her sole and separate use during her life, with remainder to the use of her first and other sons in tail, she was held to be the owner of the prior estate, as being the person who in an equitable recovery prior to the Act would have been the proper person to concur in making the tenant to the præcipe (see *Nouaille* v. *Greenwood,* T. & R. 26), and consequently to be the protector under the Act: *Re Dudson's Contract,* 8 Ch. D. 628.

In the latter case the trustees having no legal estate and no beneficial interest could not have been in any sense "owners of the prior estate" (per *Cotton,* L.J., *ibid.*), but as his Lordship points out had the legal estate been vested in the trustees, the remainders being legal, and the settlement being antecedent to the passing of the Act, a question might have arisen under sect. 31.

Prior estate belonging to two or more owners.

Where two or more persons shall be owners of a prior estate, the sole owner of which estate if there had been only one would in respect thereof have been the protector of the settlement, each of such persons in respect of such undivided share as he could dispose of shall be deemed the owner of a prior estate, and shall in exclusion of the other or

Disentailing Deeds.

others to be the sole protector to the extent of such undivided share (sect. 23).

Tenant for life of one-fourth with an estate of inheritance in one-fourth.

If a person is tenant for life of one fourth of an estate, with an estate of inheritance in one fourth, he then is protector not merely of an equivalent aliquot share in the estate, but of the identical undivided share of which he is tenant in tail: *Church* v. *Edwards*, 2 Br. C. C. 180. And so where A., B., C., and D., were joint tenants for life with remainder to A., B., C., D., and E. as tenants in common in tail male with cross remainders in tail male, and A. without the consent of B., C., or D., executed a disentailing assurance of his estates tail, and E. afterwards died without issue and without having barred his estate tail, *Jessel*, M. R., held that A. was protector not of an equivalent aliquot share, but of the same share of which he was tenant in tail, *i.e.*, his original fifth share, and also the fourth of E.'s fifth in remainder after E.'s estate tail, and that consequently both his shares had been effectually disentailed: *Tufnell* v. *Bovrell*, L. R. 20 Eq. 194.

Married woman owner of prior estate.

Where a married woman would, if single, be the protector of a settlement in respect of a prior estate which is not thereby settled or agreed or directed to be settled to her separate use (*i*) she and her husband together shall be, in respect of such estate, the protector, and shall be deemed one owner; but if the prior estate be so settled or agreed or directed to be settled she alone shall be protector (*k*) (sect. 24.)

Consent by married woman to disposition by tenant in tail.

But whether alone or jointly protector she may give her consent to a disposition by the tenant in tail as if she were a feme sole (sect. 45).

Estate confirmed or restored by settlement.

Where an estate is limited by a settlement by way of confirmation, or where the settlement merely has the effect of restoring an estate, in either case such estate shall for the purposes of this Act, so far as

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(*i*) Now the provisions of the Married Women's Property Act must be borne in mind, but see *ante*, p. 523.

Deeds executed by a married woman, as protector, need not be acknowledged (sect. 79).

(*k*) *Keer* v. *Brown*, John. 138, where the settlement was before the Act.

Disentailing Deeds.

regards the protector of the settlement, be deemed an estate subsisting under such settlement (25).

Persons excluded from protectorship.

But no lessee of a lease at a rent created or confirmed by a settlement shall in respect of such lease, no dowress shall in respect of her dower, no bare trustee (*l*) heir, executor, administrator, or assign, shall in respect of any estate taken by him in such character be protector of a settlement (sects. 26, 27).

Where one of the persons excluded is owner of prior estate.

To provide for these cases of exclusion, sect. 28 enacts that where under a settlement there shall be more than one estate prior to an estate tail, and the owner of such prior estate in respect of which he would have been protector is excluded, the person (if any) who if such prior estate did not exist would be the protector is to be the protector (*m*).

Where the person to make the tenant to the writ of entry in a recovery to be protector.

Sects. 29 & 30 contain provisions constituting in certain cases of disposition before the Act, the person who would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery, protector during the continuance of the estate which conferred on him the right to make the tenant, and s. 31 provides (notwithstanding the exclusion of a bare trustee) that when under any settlement of lands made before the passing of the Act the person who would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands shall be a bare trustee, such bare trustee shall during the continuance of the estate which conferred on him such right, be protector (*n*).

Where a bare trustee under a settlement, made before the passing of this Act, shall be the protector.

Power to settlor to appoint any

Sect. 32 enables any settlor to appoint by the settlement which entails the lands any number of persons

(*l*) With the exception in sect. 31.

(*m*) Where a bare trustee is excluded, is the office of protector to go to the person who has the beneficial interest, or to whom? See quære of *Cotton*, L.J., in *Re Dudson's Contract*, 8 Ch. D. 628, 633.

(*n*) The husband of a woman where the legal estate in lands was limited to her separate use, although under the old law he would have been the proper person to make the tenant to the præcipe, is not a "bare trustee" under this section: *Keer* v. *Brown*, 1 John. 138, 153.

Disentailing Deeds.

in esse not exceeding three, and not being aliens, to be protector in lieu of the person who would otherwise have been protector either for the whole or any part of the period for which such person might have continued protector, and to give a power of appointing by deed any one person or persons (subject to the same restriction) to be protector in lieu of any person or persons dying or by deed relinquishing the office. The person or persons so appointed shall either alone or jointly with any other person or persons then being protector, be protector; but the number is never to exceed three.

number of persons not exceeding three to be protector, and to give power of appointing by deed protector.

No deed of appointment under such a power, nor of relinquishment of the protectorship shall be operative unless inrolled within six calendar months after its execution.

Inrolment of deed of appointment to and relinquishment of protectorship.

The person who would but for this clause have been sole protector, may be one of the persons so to be appointed if the settlor please, and shall unless otherwise directed by the settlor act as sole protector if the other persons constituting the protectors shall have ceased to be so by death or relinquishment, and no other person shall have been appointed in their place: s. 32.

Person who would have been sole protector under Act may be one of the three, and may act as sole protector in certain circumstances.

The office of protector survives; and consequently if one out of two or three strangers appointed protector survives, and no power of appointing more is conferred by the settlement, then the survivor is the protector whose consent is required: *Bell* v. *Holtby*, L. R. 15 Eq. 178.

Protectorship survives.

Where, on the other hand, a testatrix by her will created estates tail, and appointed the trustees of the real estate protector of the settlement, and made provisions for the appointment of other persons to be protector in their place, and after the death of all the trustees the Court had appointed new trustees of the estate, but did not appoint such trustees protector; the Court held that the tenant for life had become protector, and that the first tenant in tail with his consent could execute a valid disentailing assurance: *Clarke* v. *Chamberlin*, 16 Ch. D. 176.

Appointment by the Court of new trustees in place of trustees constituted protectors.

Where the protector is a lunatic, idiot, or of unsound mind, whether so found or not, the Lord

Disability of protector.

Disentailing Deeds.

Chancellor or other the person or persons for the time being entrusted with the care and commitment of the custody of the persons and estates of such persons, shall be the protector in his place (s. 33). If a protector be convicted of treason or felony, or not being the owner of a prior estate, be an infant, or if it be uncertain whether he be alive or dead (*o*), or if any settlor entailing the lands shall in the settlement exclude the person who as owner of a prior estate would be entitled to be protector, and appoint no person in his stead, the Court of Chancery (now the Chancery Division) shall, as to the lands in which such prior estate shall be subsisting, be protector during the continuance of the estate; or if at any time during the continuance of a prior estate under the settlement sufficient to qualify the owner of such estate to be protector of the settlement, there happen to be no protector as to the lands in which the prior estate shall be subsisting, the Court of Chancery (Chancery Division) shall while there shall be no protector, and the prior estate be subsisting, be protector as to such lands.

The Lord Chancellor or the Court of Chancery, when sole protector (under s. 33), shall, on the motion or petition of the tenant in tail, have power to consent, and shall approve of the proposed disposition by the tenant in tail (*p*), and where jointly with any other person, the consent of the other person is required: s. 48. And the only evidence of the consent of the Lord Chancellor or the Court of Chancery is to be the order: s. 49.

Base fee.

Where there is a protector, his consent to the disposition by the tenant in tail is requisite, whether in the case of freeholds or copyholds: s. 52; otherwise a disentailing assurance executed by a tenant in tail

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(*o*) The section has a curious omission. The words run, "the Court shall be protector in lieu of the person who shall be an infant, or whose existence cannot be ascertained," without mentioning the former alternative of the protector being convicted of felony. But L.C. *Lyndhurst*, in *Re Wainewright*, 1 Ph. 258—261, held that the omission must be supplied by implication.

(*p*) The object kept in view is the benefit of the lunatic or his estate: *Re Sharp*, 3 Ch. D. 59.

Disentailing Deeds.

and duly inrolled in Chancery, or entered on the Court Rolls (s. 54), will be incapable of conferring more than a *base fee, i.e.*, that estate into which an estate tail is converted where the issue in tail are barred, but not those in remainder : s. 34.

Enlargement of base fee.

A tenant in tail, notwithstanding that he has created and parted with a base fee (*q*), may by an inrolled deed enlarge that base fee into a fee simple absolute, when there is no longer a protector : s. 19 ; or, during the protectorship, with the protector's consent : s. 35 ; and where the base fee becomes united with the immediate remainder or reversion in fee in the same lands, the base fee, instead of being merged into the greater estate shall *ipso facto* become enlarged : s. 39.

Protector to be irresponsible as to giving or withholding consent.

A protector is absolutely irresponsible (*r*) in the exercise of his power of consenting, any attempt to control or defeat his discretion, or any agreement entered into by him to withhold his consent, being declared to be void ; and the jurisdiction of the Court of Equity is excluded : s. 36.

And by s. 37, the equitable rules in relation to dealings between the donee and objects of a power are declared to be inapplicable to the dealings between protector and tenant in tail.

Consent once given irrevocable.

Consent, however, when once given is irrevocable : s. 44.

Consent, how it may be given.

The consent may be given by the disentailing assurance itself, or by a distinct deed, to be executed either on, or at any time before the day on which the assurance is made, otherwise the consent will be void : s. 42 ; and the consent, if given by a distinct

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(*q*) See *Bankes* v. *Small*, 36 Ch. D. 716, where the contrary was argued.

(*r*) In *Bankes* v. *Le Despencer*, 11 Sim. at p. 527, *Shadwell*, V.-C., says : "By the 36th section a protector is made irresponsible, and is at liberty to act from mere caprice, ill-will, or any bad motive. By the 37th section, a protector is enabled to take a bribe for giving consent." And in *Bankes* v. *Small*, 36 Ch. D. 716, where it was held that as against the tenant in tail personally it could enforce a covenant to execute a disentailing assurance, notwithstanding the exclusions of the jurisdiction of equity by sect. 47, the Court declined to decide how far, if at all, it would enforce specific performance of such a contract by a protector.

Disentailing Deeds.

deed, is to be considered absolute and unqualified, unless expressly confined by the protector to a particular disentailing assurance. The deed, if distinct, must be enrolled either at or before the time when the assurance is enrolled : s. 46.

Copyholds, where estate legal—consent if given by deed ;

If where the estate of the tenant in tail be legal, the consent of the protector be given by deed, the deed must be executed by the protector either at or before the time of making the surrender, and produced to the lord of the manor or steward, otherwise the consent will be void. Acknowledgment of production within the time limited must be indorsed on the deed by the lord or steward, who must cause such deed so indorsed to be entered on the Court Rolls, and must indorse on it a memorandum of such entry. The consent, if not given by deed, must be given by the protector to the person taking the surrender : s. 52 ; which section further provides for evidencing the fact of the consent having been given when the surrender is made (1) out of Court ; (2) in Court.

if not given by deed.

Where estate equitable.

Where the estate tail is equitable, if the protector gives his consent by a distinct deed, the consent will be void unless the deed be executed by the protector either on or at any time before the day on which the deed of disposition is executed by the equitable tenant in tail ; and the deed of consent must be entered on the Court Rolls (see sect. 53) either at or before the entry of the disentailing deed : s. 46.

Confirmation of voidable estate created by tenant in tail in favour of a purchaser for value.

A voidable estate created by the tenant in tail in favour of a purchaser for value, will be confirmed by a subsequent disposition, other than a lease not requiring inrolment, by the tenant in tail, with the consent of the protector (if any), whatever may have been the intention of the tenant in tail in making such disposition. If the requisite consent is not given, then the voidable estate is confirmed as far as it can be without such consent. But in no case is the confirmation to prevail against a purchaser for value from the tenant in tail without express notice of the voidable estate, nor those claiming under the purchaser : s. 38.

Disentailing Deeds.

Exclusion of Equitable Jurisdiction of the Court.]—By sect. 47, the jurisdiction of Courts of Equity is excluded. The section, which is of great importance, is as follows:— Jurisdiction of courts of equity excluded.

"In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of Equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration or not, in regard to—

"(1.) the specific performance of contracts; and

"(2.) the supplying of defects in the execution *either* of the powers of disposition given by this Act to tenants in tail, *or* of the powers of consent given by this Act to protectors of settlements; and

"(3.) the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively; and

"(4.) in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement, which in a court of law would not be an effectual disposition or consent under this Act.

"And no disposition of lands under this Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this Act by a tenant in tail thereof in equity shall be of any force unless such disposition or consent would, in case of an estate tail at law be an effectual disposition or consent under this Act in a court of law."

Application of section.

This section is governed by the introductory words, "In cases of dispositions of lands under this Act by tenants in tail thereof," and only applies to the case where there has been an attempt on the part of the tenant in tail to dispose of land by an assurance meant for and intended to operate as a disentailing assurance. The jurisdiction on the points specified in the section is consequently only excluded where its aid would, but for the Act, have been invoked in support of something intended to take effect as a "disposition of land under the Act."

Court will not supply defect in deed intended to

The Court will not supply any defect in or want of execution of a deed intended as a disentailing assurance; it will not under its jurisdiction of spe-

Disentailing Deeds.

operate as a disentailing assurance.

cific performance treat a contract to execute a disentailing assurance as a deed effectual to bar the estate tail.

Enforcement of covenant to execute disentailing assurance.

But where a tenant in tail has in a deed of conveyance which by reason of the refusal of the protector to consent is inoperative to pass more than a base fee, covenanted to execute a disentailing assurance when and if he obtains power to do so, the Court will enforce specific performance of that covenant as against the tenant in tail personally by its ordinary process of contempt. The judgment of the Court will not be binding upon the succeeding issue in tail who claim by a title paramount, and consequently if the tenant in tail were to die before obeying the order, this judgment of the Court would be no longer operative: *Bankes* v. *Small*, 36 Ch. D. 716. In that case, the Court referred to the old practice of the Court of Equity before the Act of enforcing a contract to levy a fine or suffer a recovery against the tenant in tail, who had entered into the contract personally (*Att.-Gen.* v. *Day*, 1 Ves. sen. 213; Hayes' Introduction of Conveyancing, 5th ed. 155; Lord St. Leonards on Real Property Statutes), leaving the succeeding issue in tail unaffected.

The prohibition is limited to this, that nothing but the *particular* instrument attended with the particular formalities shall be effectual as a disposition of the lands comprised in it so as to bar the estate tail in those lands.

Jurisdiction of rectification retained.

But this section does not preclude the Court from rectifying the deed of disposition itself, if it be shown that the instrument as executed and enrolled does not carry out the intention of the parties: *Hall Dare* v. *Hall Dare*, 31 Ch. D. 251.

The power of rectification is not, for the purposes of this section, a branch of specific performance (per *Fry*, L.J., *ibid.*, p. 260), and the power must be treated, in the absence of any expression to the contrary, as reserved to the Court.

Consequently, where estates were disentailed and resettled by one and the same deed, which was duly inrolled, and it was proved that in the resettlement certain limitations had been omitted by mistake, the

Court of Appeal (reversing the decision of *Bacon*, V.-C.) held that the jurisdiction to rectify, on the ground of mistake or fraud, a disentailing assurance after inrolment was not taken away, and that the deed might be altered so as to carry out the real intention of the parties (*ibid.*). Disentailing Deeds.

It is advisable, as well for the reason suggested by the above case, as also for the purpose of avoiding increased expense by the inrolment of a longer deed, that the deed of disposition should be confined merely to the object of disentailing the property, by limiting the estate to the tenant in tail in fee simple, or to such uses as he, either alone or jointly with his father, or other person or persons, as the case may be, shall appoint: and that any intended resettlement should be effected by a distinct deed, which will of course not require inrolment. Disentailing assurance should be confined to that object.

Parcels should be described in very general terms. Parcels.

Again, it is undesirable to disentail through the medium of a mortgage: Hayes, Intr. Conv., 5th ed. p. 163. Mortgage.

Entailed Money.]—By sect. 71 it is provided that lands to be sold, of whatever tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased, would, if purchased, have been actually subject to: and, consequently, they may be disentailed if freehold or leasehold, or of any other tenure except copyhold, or if money, subject to the provisions of the Act relating to the disentailment of freeholds; if copyhold, to those applicable in the case of copyholds. Application of the provisions of the Act to entailed money.

Where the property disentailed consists of leasehold lands for years absolute or determinable, or of money, such lands or money shall, as to the person

Disentailing Deeds.

in whose favour or for whose benefit the disposition is made, be treated as personal estate.

Leaseholds or money are to be disposed of by an assignment by deed to be inrolled, except in the case of bankruptcy, when the disposition is to be by the commissioner (trustee), and completed by inrolment in manner directed by the Act in regard to lands not held by copy of Court Roll.

Where money representing lands sold and liable to be reinvested in land in Court, disentailing deed necessary before paying out.

It has been decided that where money representing land sold, and which is liable under the settlement or statute under which it is sold to be laid out in other lands to be entailed, is in Court, a disentailing deed is necessary before it will be handed over to the tenant in tail: *Re Broadwood's Settled Estates*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. D. 61.

Separate limitations and conditions of real and personal estate.

Where real estates are disentailed, together with the entail, will fall the limitations and conditions contained in the settlement with respect to the enjoyment of the land, *e.g.*, a name and arms clause will no longer be operative. When personalty is settled, to go along with the settled real estate as realty, if it is desired to prevent the operation of the disentailing deed of the real estates, a separate name and arms clause can be inserted limited to the personalty: *Cornwallis* v. *Wykeham Martin*, 32 Ch. D. 388.

Bankrupt tenant in tail.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 56 (cl. 5), the trustee (subject to the provisions of the Act) may "deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it; and sects. 56 to 73 (both inclusive)" of the Fines and Recoveries Act "shall extend and apply to proceedings under this Act, as if those sections were here re-enacted and made applicable in terms to those proceedings."

Application of provisions of 3 & 4 Will. 4, where trustee in place of bankrupt tenant in tail.

The provisions relating to the consent of the protector, the time and manner of giving consent, the inrolment or entry on the Court Rolls of the deeds of disposition, and of the distinct deeds of consent where the consent is given, are to apply to the cases where the trustee is substituted for the bankrupt

tenant in tail (ss. 56—59), for the enlargement of base fee (see sects. 60, 61), for confirmation of voidable estates (s. 62). Disentailing Deeds.

Statute of Limitations.]—Where, under the Statute of Limitations (37 & 38 Vict. c. 57, which by sect. 9, incorporates 3 & 4 Wm. 4, c. 27, ss. 21, 22), the right of a tenant in tail to recover land or rent is barred by the lapse of twelve years, the right of all persons claiming under him whose estate, interest, or right he could have barred, is also defeated. And when time has commenced running against a tenant in tail, and he dies before the expiration of the twelve years, the right of all such persons is defeated unless asserted within twelve years, computed from the time when it commenced to run against the tenant in tail. Remainders barred twelve years after execution of imperfect disentailing assurance.

By 37 & 38 Vict. c. 57, s. 6 (substituted for the repealed s. 23 of 3 & 4 Wm. 4, c. 27, and in almost identical terms, with the exception that in the later Act twelve is substituted for twenty), where any person by virtue of an assurance by a tenant in tail which is not effectual to bar the remainders is in possession or receipt of the profits, and continues in such possession or receipt for twelve years after the time at which the assurance if then executed by the tenant in tail without the consent of any other person would have barred the remainders, the remainders will at the expiration of such period of twelve years be also barred.

The intention of sect. 23 (and consequently of sect. 6), was to meet the case of possession under a base fee. "The possession by virtue of such assurance to be effectual must be a possession by virtue of an assurance which turned an estate tail into a base fee:" per *Hall*, V.-C., *Mills* v. *Capel*, L. R. 20 Eq. 692, 698, a case on sect. 23. See also Sugd. V. & P. 483, 484.

That section was held only to apply to assurances which are effectual to bar the issue in tail, and consequently an uninrolled assurance will not fall within it: *Penny* v. *Allen*, 7 De G. M. & G. 409; *Morgan* v. *Morgan*, L. R. 10 Eq. at p. 104.

Disentailing Deeds.

Quasi Entail.]—Although an estate *pur autre vie* cannot strictly speaking be entailed under the statute de Donis (*s*), successive limitations may be created of an estate *pur autre vie,* quasi estates for life, in tail, and in fee in remainder, quasi executory devises over.

Quasi entails of estates *pur autre vie.*

The Fines and Recoveries Act does not refer to quasi entails of estates held *pur autre vie,* but it is settled, following the analogy of simple estates of inheritance, that any disposition *inter vivos* by the quasi tenant in tail in possession, or by the quasi tenant in tail in remainder with the concurrence of the tenant for life, will bar all the remainders: *Allen* v. *Allen,* 2 Dr. & War. at p. 324 *et seq.*

Some act necessary to bar the entail and remainders over.

The quasi tenant in tail's interest is not analogous to a fee simple conditional at common law which becomes absolute upon the birth of issue, but he must do some act to bar the entail and remainders over, and he need not wait for the birth of issue.

The only thing required is vesting of a new and different estate in quasi tenant in tail.

If in possession, he may by any act *inter vivos* deal with the estate as if there were no settlement, no technicalities are required; all that is necessary is that a new and different estate should be vested in him, *e.g.,* a mere renewal of a lease will bar the estates in remainder, and give the tenant in tail renewing a new estate, discharged from the former limitations (*t*); and a renewal by a tenant for life and subsequent conveyance of it by him to the quasi tenant in tail in remainder, will equally bar the estate tail. The existence of prior incumbrances is immaterial. No technicality being required, the quasi estate tail and the remainders over will be barred by a deed in which the tenant for life is the sole conveying party, the quasi tenant in tail in remainder only executing the deed; and conversely by a deed in which the quasi tenant in tail in remainder, is the sole conveying party, the tenant for life only executing the deed.

(*s*) Blackstone's Commentaries, Vol. II., p. 127.

(*t*) See *Baker* v. *Bayley,* 2 Vern. 225; *Grey* v. *Mannock,* 2 Eden, 339.

Disentailing Deeds.

Quasi base fees.

An alienation by a quasi tenant in tail in remainder without the concurrence of the quasi tenant for life in possession, will not bar the remainder expectant on the estate tail; but it would seem that, following the analogy of estates of inheritance, a quasi tenant in tail in remainder ought to be able with the concurrence of the tenant for life to bar himself and his own issue, and thus create a quasi base fee (*u*).

(*u*) See the judgment of *Sugden*, L.C., in *Allen* v. *Allen*, 2 Dr. & War. 307, from which the above remarks are taken. And see judgment of *Fry*, J., in *Re Barber's Settled Estate*, 18 Ch. D. 624.

CHAPTER IX.

STAMP DUTIES ON SETTLEMENTS.

Stamps.

Stamp Act, 1870.

THE schedule to the Stamp Act, 1870 (33 & 34 Vict. c. 97), contains the following clause :—

"SETTLEMENT.—Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever (*x*) :

"For every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled . . . . . 5*s.* 0*d.*

"*Exemption.*

"Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, created by a previous settlement stamped with *ad valorem* duty in respect of the same property, or by will, where probate duty has been paid in respect of the same property as personal estate of the testator."

An instrument, whereby property chargeable as above with *ad valorem* duty is settled or agreed to be settled together with other property not liable to such duty, is apparently chargeable with an additional duty of 10*s.* in respect of such other property : see *Clayton* v. *Burtenshaw*, 5 B. & C. 41.

(*x*) The Stamp Commissioners claim the following duties in respect of monies, stocks, or securities settled, or agreed to be settled : —(1) where the settlor's interest is reversionary and of a definite amount, *ad valorem* duty on the full value, as if it were an interest in possession, but no such duty in respect of contingent accretions by reason of deaths of beneficiaries under age, or otherwise ; (2) where the settlor is entitled in default of appointment, *ad valorem* duty on the full amount to which he is so entitled. The validity of these claims may, perhaps, be open to question.

Stamps.

The Act contains the following special provisions with regard to stamp duties on settlements :

As to settlement of policy or security.

Sect. 124. "Where any money which may become due or payable upon any policy of insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby such settlement is made or agreed to be made is to be charged with *ad valorem* duty in respect of such money.

"Provided as follows :

Proviso as to policies.

"(1.) Where in the case of a policy of insurance, no provision is made for keeping up the policy, the *ad valorem* duty is to be charged only on the value of the policy at the date of the instrument ;

"(2.) If in any such case the instrument contains a statement of such value, and is stamped in accordance with such statement, it is, so far as regards such policy, to be deemed duly stamped, unless or until it is shown that such statement is untrue, and that the instrument is in fact insufficiently stamped."

Settlements, when not to be charged as securities.

Sect. 125. "(1.) An instrument chargeable with *ad valorem* duty as a settlement in respect of any money, stock, or security is not to be charged with any further duty by reason of containing provision for the payment or transfer of the same money, stock, or security.

"(2.) Where any money, stock, or security is settled or agreed to be settled by a person who has only a reversionary interest therein, and the instrument whereby such settlement is made or agreed to be made contains a covenant by the person entitled in possession to the interest or dividends of such money, stock, or security for the payment, during the continuance of such possession, of any annuity or yearly sum not exceeding interest at the rate of four pounds per centum per annum upon the amount or value of such money, stock, or security, such instrument shall not be charged with any duty in respect of such covenant."

Where several instruments, one only to be charged with *ad valorem* duty.

Sect. 126. "(1.) Where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of such property exceeds ten shillings, one only of such instruments is to be charged with the *ad valorem* duty.

"(2.) Where a settlement is made in pursuance of any previous agreement or articles upon which any *ad valorem* settlement duty exceeding ten shillings has been paid in respect of the same property, such settlement is not to be charged with any *ad valorem* settlement duty.

"(3.) In each of the aforesaid cases the instruments not

Stamps.

chargeable with *ad valorem* duty are to be charged with the duty of ten shillings."

When a settlement contains a covenant to settle after-acquired property, it should bear an extra 10*s.* stamp to cover the covenant. When the covenant is known to include present unspecified property, and such present property comprises money or stock, or an interest in money or stock, the settlement should be stamped *ad valorem* accordingly.

If an annuity is created by a settlement, the deed will be liable to *ad valorem* duty in respect of the covenant for payment of the annuity. With regard to such covenants the Schedule to the Stamp Act, 1870, imposes the following duties :—

"Bond, Covenant, or Instrument of any Kind Whatsoever.

"(1). Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security), or of any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

"For a definite and certain period, so that the total amount to be ultimately payable can be ascertained	The same *ad valorem* duty as a bond or covenant for such total amount.
"For the term of life or any other indefinite period :	
"For every 5*l.*, and also for any fractional part of 5*l.* of the annuity or sum periodically payable	£ *s.* *d.* 0 2 6

"(2.) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes where the principal or primary instrument is duly stamped :

"Where the total amount to be ultimately payable can be ascertained	The same *ad valorem* duty as a bond or covenant of the same kind for such total amount

An order of Court making a settlement must bear the usual settlement stamp : *Gowan* v. *Gowan*, 17 Ch. D. 778. By the Customs and Inland Revenue Act, 1888, (51 Vict. c. 8) if a settlement is not duly stamped within thirty days after it is first executed, or, if executed abroad, after it has been first received in the United Kingdom, the *settlor* is rendered liable

Stamps.

to heavy penalties: but the Commissioners have power at any time within three months after the execution of the instrument to remit the penalties: see sect. 18, and the Schedule to the Act; and see *post*, sub tit. "STAMP DUTIES," Vol. VII. pp. 16, 101 n.

By sect. 19 of the Act of 1888, it is enacted that:—

19. "(1.) No assignment of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby or to give a valid discharge for the same, or any part thereof unless such assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

"(2.) If any payment shall be made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt to her Majesty from the company or person by whom such payment is made, and shall be recoverable as such accordingly."

The last-mentioned Act contains various provisions as to the charge of duties on foreign or colonial share certificates, securities for money of any company or corporation, or by or on behalf of any foreign or colonial state, government, municipal body, corporation or company, being marketable securities, and transferable by delivery: sect. 12; on transfers, assignments (otherwise than on mortgage) of marketable bonds, &c., not transferable by delivery: sect. 13; as to duty on mortgages of stock or marketable securities: sect. 14; on equitable mortgages: sect. 15; and on contract notes (s. 16).

As to account duty on voluntary dispositions of personalty by way of *donatio mortis causâ* or voluntary settlement: see sect. 38 of the same Act, set out and considered *post*, sub tit. "STAMP DUTIES," Vol. VII. pp. 198 *et seq.*

Stamp duty on disentailing deeds.

As regards the stamping of disentailing deeds, if by virtue of such a deed any property is vested in a purchaser or in any person by his direction, it will be liable to *ad valorem* duty as a conveyance on sale: see sect. 70 of the Stamp Act, 1870. But when a disentailing deed operates merely so as to vest the property in the tenant in tail free from his estate tail, the deed will require only an ordinary deed stamp of 10*s.* as a deed not otherwise specially charged.

PRECEDENTS.

I. *SETTLEMENT on* MARRIAGE *of a Sum of* STOCK *belonging to the* WIFE, *the* INCOME *to be paid to the* WIFE *without power of anticipation for her* LIFE; *and after her death to the* HUSBAND *for his life.* TRUSTS *for* ISSUE, *and* USUAL CLAUSES. *Ultimate* TRUST *for* WIFE *in default of Issue.* COVENANT *to* SETTLE AFTER-ACQUIRED PROPERTY. POWER *for* WIFE, *upon a* FUTURE MARRIAGE, *to* WITHDRAW *Funds from Settlement in* PROPORTION *to* NUMBER *of* CHILDREN *of* INTENDED MARRIAGE. TRUSTEE CLAUSES.

Parties.

THIS INDENTURE (*a*), made the —— day of ——, 18—, BETWEEN (*b*) [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., spinster, of the second part; and [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the third part:

Recitals (*c*): of intended marriage;

WHEREAS a marriage is intended shortly to be solemnized between the said [*husband*] and [*wife*];

of transfer of stock to trustees;

AND WHEREAS, pursuant to an agreement made upon the treaty for the said intended marriage, the sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock, belonging to the said [*wife*], has been transferred into the names of the said [*trustees*] in the books of the governor and company of the Bank of England, to be held by them in trust for the said wife until the said intended marriage, and thereafter upon the trusts, and with and subject to the powers and provisions hereinafter declared of and concerning the same:

of agreement

AND WHEREAS upon the treaty for the said intended marriage it was agreed that these presents should contain such

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Stamp.

(*a*) Stamp, 5*s.* per 100*l.* on the amount of the stock brought into settlement, and 10*s.* in respect of the covenant to settle after acquired property.

(*b*) As to the parties to a settlement of personalty on marriage, see *ante*, pp. 251, 252.

(*c*) As to the insertion of recitals in settlements, see *ante*, p. 252.

I. Of Stock belonging to Wife.

covenant or agreement as is hereinafter contained for settling any property real or personal, except as hereinafter mentioned, of or to which she the said [*wife*] may be or become possessed or entitled at the time of the said intended marriage, or during the now intended coverture: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said intended marriage, it is hereby agreed and declared that the said [*trustees*], their executors, administrators, and assigns, shall stand possessed of the said sum of £—— 2¾ Consolidated Stock hereinbefore recited to have been transferred to them, IN TRUST for the said [*wife*] until the solemnization of the said intended marriage; And thereafter UPON TRUST that the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee"), shall either allow the said sum of £—— 2¾ Consolidated Stock to remain in its present state of investment so long as the said trustees or trustee may think fit, or shall, at any time or times, with the consent in writing of the said [*husband*] and [*wife*] during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor, at the discretion of the said trustees or trustee, sell the same sum of stock, or any part or parts thereof, and invest the proceeds of such sale or sales in the names or name of them or him, the said trustees or trustee, in the purchase of, or at interest upon any stocks, funds, or securities, which may for the time being be authorised by any statute or order of Court for the investment of trust funds or of cash under the control of the Chancery Division of her Majesty's High Court of Justice, but not in any other stocks, funds, or securities: AND may from time to time, with such consent or at such discretion as aforesaid, vary, alter, or transpose all or any of the said stocks, funds, and securities, into or for other stocks, funds, or securities of the same or a like nature; AND shall during the joint lives of the said [*husband*] and [*wife*], pay the income of the said sum of £—— 2¾ per cent. Consolidated Stock, and of the investments for the time being representing the same (which sum of stock and investments are hereinafter called "the said trust fund"), unto the said

for settlement of wife's after-acquired property.

Testatum.

Declaration of trusts of stock:

trust for investment;

investment clause restricted to statutory investments (*d*);

power to vary investments;

trust of income for wife during joint lives of herself and husband without power of anticipation;

(*d*) For other forms of investment clauses, see *post*, pp. 554, 558 and 562. And as to investments of trust funds generally, see *ante*, pp. 255 *et seq.*, and *post*, pp. 794 *et seq.*

I. Of Stock belonging to Wife.

[*wife*] for her separate use, but so that she shall have no power to anticipate the same; And from and after the death of such one of them the said [*husband*] and [*wife*] as shall first die, shall pay the income of the said trust fund to the survivor of them, and his or her assigns, during his or her life, but so that the said [*wife*] shall not during the said intended coverture have power to dispose of or charge such reversionary life interest by way of anticipation (*e*); And from and after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of the said trust fund and the income thereof, In trust for all or such one or more exclusively of the others or other of the children or remoter issue of the said intended marriage, [such remoter issue to be born and take vested interests within twenty-one years from the death of the survivor of them the said [*husband*] and [*wife*] (*f*)], at such age or time or respective ages or times, and if more than one in such shares, and with such future, executory, or other trusts for the benefit of the said issue, or some or one of them, and with such provisions for the maintenance, education, advancement, and benefit of such children or issue or some or one of them, either after the death of the said [*husband*] and [*wife*], or during their joint lives, or the life of the survivor of them, with their, his, or her consent in writing, at the discretion of the said trustees or trustee, or of any other person or persons, and subject to such restrictions, conditions, and provisions, and generally in such manner in all respects (*g*) as the said [*husband*] and [*wife*] shall by any deed or deeds, revocable or irrevocable, jointly appoint; And in default of such joint appointment, and so far as no such appointment shall extend, then as the survivor of them the said

trust for survivor for life;

remainder for issue as husband and wife shall appoint (*full form*);

remainder as survivor shall appoint;

(*e*) See as to the propriety of inserting this restraint, *ante*, p. 295. If desired the restraints may be omitted from the trusts, and a general clause restraining anticipation by the wife of any of her interests under the settlement may be inserted in a subsequent part of the deed, as in Precedent X., *post*, p. 586.

(*f*) The insertion of the words in brackets is not necessary, and may be omitted if desired. An appointment under a power not so restricted will be good, provided the appointment does not itself violate the rule against perpetuities: *Routledge* v. *Dorril*, 2 Ves. Jun. 357; see *Thomas* v. *Thomas*, 14 Sim. 234. As to the distinction between general and special powers, as regards the rule against perpetuities, see Sugd. Pow., pp. 392 *et seq.*

(*g*) As to the proper mode of framing powers of appointment, *ante*, pp. 299 *et seq.* A shorter form of such a power will be found, *post*, p. 556.

I. Of Stock belonging to Wife.

[*husband*] and [*wife*] shall in like manner, or by will or codicil appoint; And in default of and so far as no appointment under either of the powers hereinbefore contained shall extend, In Trust for all the children or any the child of the said intended marriage, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry [with the consent of his or her parents or parent, or guardians or guardian], and if more than one in equal shares; Provided Always that no child who or whose issue shall take any share or shares, interests or interest, in the said trust fund by virtue of any appointment or appointments made under either of the powers lastly hereinbefore contained shall, in the absence of an express declaration to the contrary in any such appointment, take any share or shares, interest or interests, in the unappointed part of the said trust fund without bringing such appointed share or shares, interest or interests, into hotchpot and accounting for the same accordingly; Provided Always, and it is hereby agreed, that the said trustees or trustee may at any time or times after the death of the said [*husband*] and [*wife*] or in their, his, or her lifetime, with their, his, or her consent in writing, raise any part or parts, not exceeding in the whole one-half of the then vested, contingent, presumptive, or expectant share, or respective shares of any child or children of the said intended marriage in the said trust fund under the trusts hereinbefore contained, and pay or apply the same in or towards the advancement, [including in the term "advancement" the expenses of a college or university education, or of preparation for any profession

trust, in default of appointment, for children equally at twenty-one or marriage;

hotchpot clause;

power of advancement (*h*);

(*h*) Express powers for maintenance, education and accumulation of surplus may now generally be omitted in reliance on the statutory provisions, as to which see *ante*, pp. 304 *et seq.*

It may, however, be useful to give in this place the forms of maintenance and accumulation clauses formerly in use in settlements of property; these forms may be varied, if desired, according to the special exigencies of the particular case: see the forms given, *post*, sub tit. "Wills," Vol. VII., pp. 910 *et seq.*

"Provided Always, and it is hereby agreed and declared, that the said trustees or trustee shall after the death of the said [*husband*] and [*wife*] apply the whole or such part as they or he shall think fit, of the income of the expectant or presumptive share of any child of the said intended marriage under the trusts hereinbefore contained, for or towards the maintenance and education, or otherwise for the benefit of such child

Maintenance clause.

I. Of Stock belonging to Wife.

or employment, or competitive examination (*i*)], or otherwise for the benefit of such child, children, or other issue in such manner as the said trustees or trustee shall think fit: And it is hereby agreed that if there shall be no child of the said intended marriage who, being a son, shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, [with such consent as aforesaid], then, subject and without prejudice to the trusts and powers hereinbefore declared and contained, or by law vested in the said trustees or trustee, they or he, the said trustees or trustee, shall stand possessed of the said trust fund and the income thereof, or so much thereof as shall not have become vested or been applied under any of such trusts or powers, upon the trusts following, that is to say: In Trust for such person or persons, and for such purposes, as the said [*wife*] shall during coverture by will or codicil, or when not under coverture

ultimate trusts for wife, in default of issue.

[whether or not there is any other fund applicable to provide for any such purpose]: And may, at their or his absolute discretion, either themselves or himself so apply the same income, or any part thereof, or may pay the same to the guardian or guardians of such child for the purposes aforesaid, without seeing to the application thereof: And shall during the suspense of absolute vesting of any such share as aforesaid, accumulate all the residue (if any) of the same income by way of compound interest, by investing the same and all the resulting income thereof from time to time in or upon any such stocks, funds, shares, or securities as are hereinbefore authorised for investments, for the benefit of the person or persons who, under the trusts, powers, and provisions herein contained, shall become entitled to the principal fund or share from which the same respectively shall have proceeded; With power for the said trustees or trustee to resort to the accumulations of any preceding year or years, and to apply the same for or towards the maintenance or education of the person or persons for the time being presumptively or expectantly entitled to the same, in the same manner as such accumulations might have been applied in case they had been income arising from the original trust fund in the year in which the same shall be so applied."

Accumulation clause.

(*i*) The insertion of the words in brackets may be advisable in the use of a settlement of property belonging to persons of small or moderate means, who otherwise might not be able to afford such expenses without serious inconvenience. See as to advancements generally, *ante*, pp. 311 *et seq.*

I. Of Stock belonging to wife.

by any deed or deeds with or without power of revocation and new appointment, or by will or codicil appoint; And in default of such appointment, and so far as no such appointment shall extend, upon the trusts following, that is to say, if the said [*wife*] shall survive the said [*husband*], then IN TRUST for the said [*wife*] absolutely, but so that she shall not during the said intended coverture have power to dispose of or charge such reversionary absolute interest by way of anticipation; But if the said [*husband*] shall survive the said [*wife*], then IN TRUST for such person or persons as would have become entitled thereto under the statutes for the distribution of the effects of intestates had she died possessed thereof intestate and without ever having been married, such persons, if more than one, to take as tenants in common in the shares in which they would have taken under the same statutes: AND THIS INDENTURE ALSO WITNESSETH that, in pursuance of the said agreement in this behalf, and for the consideration aforesaid, it is hereby agreed and declared, and the said [*wife*] hereby covenants with the said [*trustees*] that if the said intended marriage shall be solemnized, and if the said [*wife*] shall then be, or shall at any time during the now intended coverture become, in any manner, seised, possessed of, or entitled to, or acquire an absolute power of disposition over any real or personal property, which shall amount or be equal in value from any one source, at any one time, to the sum of £ ——, for any estate or interest whatsoever, save only and except the said trust fund hereby settled, and any estate or interest to which she shall be or become entitled for her life only, or for a less period, and jewels, trinkets, ornaments, plate, pictures, prints, books, furniture and other moveable chattels, (which excepted premises it is hereby agreed and declared shall belong to her absolutely, and, as to any such life estates or interests as aforesaid, for her separate use without power of anticipation), and save and except any property as to which the donor, settlor, or testator, from whom the same shall be acquired, shall indicate an intention that the same shall not fall under the operation of such an agreement or stipulation as this present agreement, then, and so often as the same shall happen, the said [*wife*], and all other necessary parties, shall at the cost of the trust estate,

Second *testatum.*

Covenant to settle after-acquired property (*ii*).

(*ii*) As to the duties of trustees under such covenants, see *Ex parte Geaves*, 8 De G. M. & G. at p. 309.

I. Of Stock belonging to Wife.

from time to time as soon as circumstances will admit effectually settle and assure such other present or after-acquired property, with the exceptions aforesaid, or cause the same to be effectually vested in the said trustees or trustee, UPON TRUST with all convenient speed and in such manner as the said trustees or trustee shall think fit to sell or convert the same into money, and to stand possessed of the proceeds of such sale or conversion upon the same trusts, and with and subject to the same powers and provisions, as are herein declared of the said trust fund; PROVIDED ALWAYS that it shall not be obligatory on the said trustees or trustee to convert into money any other present or after-acquired property of the said [*wife*] which is of a reversionary nature whilst the same shall continue reversionary; PROVIDED ALWAYS, and it is hereby agreed and declared that, if the said [*wife*] shall survive the said [*husband*], it shall be lawful for the said [*wife*], at any time or times after the death of the said [*husband*], either in contemplation of or after any future marriage, by any deed or deeds, with or without power of revocation and new appointment, or by will, or codicil, to appoint in favour of any husband with whom she may intermarry after the death of the said [*husband*], and of her child, children, and issue by any future husband or husbands with whom she

Declaration of trusts of after-acquired property.

Proviso as to reversionary property.

Power for intended wife to withdraw funds from settlement in proportion to the number of the children of the intended marriage and to appoint to a future husband, and in favour of her issue by him (*j*).

(*j*) The following are alternative forms of clauses empowering the intended wife, if she should survive her husband, to make provision out of the trust funds in favour of a future husband and the issue of a future marriage:—

Power for wife to withdraw a definite sum from the settlement on a second marriage.

(1) "PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said [*wife*] shall survive the said [*husband*] and marry again, it shall be lawful for her by deed either in contemplation of or after such remarriage to withdraw from the settlement hereby made out of the property hereby settled or covenanted to be settled a sum of not exceeding £——; provided nevertheless that no such withdrawal shall be made if there shall be more than four children of the said now intended marriage who being sons shall attain the age of twenty-one years or die under that age leaving issue, or being daughters shall attain that age or marry under that age; provided also that this power of withdrawal shall not be exercisable to the prejudice of any previous appointment in favour of a child or issue of the said now intended marriage."

Power for wife to include

(2) "PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said [*wife*] shall survive the said [*husband*] and

I. Of Stock belonging to Wife.

may intermarry, after the decease of the said [*husband*], such shares and interests of and in the property hereby settled and agreed to be settled as follows, that is to say: in case there shall not be more than one child of the now intended marriage, who being a son shall attain the age of twenty-one years or die under that age leaving issue, or being a daughter shall attain that age or marry, then two equal third parts or shares of such property; and in case there shall be more than one such child, but not more than three such children, then one equal half part or share of such property; and in case there shall be more than three, but not more than five such children, then one equal third part or share of such property, in favour of any such future husband, and the child, children, or remote issue of the said [*wife*] by every or any such future husband, but so that no such future husband shall by virtue of any such appointment take any greater interest in such property than for his life, and that the trusts, powers, and provisions in favour of the child, children, or issue of the said [*wife*] by any such future husband, shall be similar to those herein declared in favour of the child, children, and issue of the now intended marriage, failing which the portion of the trust property to be appointed under this power shall remain subject to the trusts of this settlement, and so that the interest

children of a second marriage in appointment under powers to children of intended marriage.

shall marry again while there shall be living any child or children of her said now intended marriage, then and in such case the children or child of such second marriage of the said [*wife*] shall become and be objects or an object of the power of appointment hereinbefore contained which will then be vested in the said [*wife*] as the survivor of the said [*husband*] and herself, and of all and singular other the trusts powers and provisions hereinbefore contained in favour of the child or children of the said now intended marriage in like manner to all intents and purposes as if the said child or children of such second marriage had been a child or children of the said now intended marriage but so nevertheless as not to prejudice or affect any exercise by the said [*husband*] and [*wife*] of their joint power of appointment hereinbefore contained in favour of any issue of the said now intended marriage, nor any exercise by the said [*wife*] alone previously to her second marriage of the aforesaid power vested in her as such survivor as aforesaid."

See also another form, *post*, p. 611.

I. Of Stock belonging to Wife.

or share of property to be appointed under this power shall not be withdrawn from the trusteeship of these presents, until absolutely and indefeasibly vested in some person in possession; PROVIDED ALWAYS that any such appointment or appointments as last aforesaid may be made by the said [*wife*] under the aforesaid power enabling her in that behalf, while it shall be uncertain whether or to what extent the same shall be capable of taking effect, and if so made shall take effect according to the event, and to the number of the children of the said now intended marriage who being sons or a son shall attain the age of twenty-one years or die under that age leaving issue, or being daughters or a daughter shall attain that age or marry under that age: PROVIDED ALWAYS, and it is hereby declared, that the statutory power of appointing a new trustee or new trustees of these presents, when and so often as a vacancy shall occur, shall be vested in the said [*husband*] and [*wife*] during their joint lives and the survivor of them during his or her life; PROVIDED ALWAYS that in addition to the indemnity given by law to trustees the said trustees or trustee shall not be answerable or accountable for lending on the security of any hereditaments of a less than marketable title (*jj*); PROVIDED ALWAYS that any trustee of these presents being a solicitor or other person engaged in any profession or business may be so employed or act in or about the execution of the trusts of these presents [and particularly may receive and give discharges (being a solicitor) for any money or any valuable consideration or property receivable, and (being a solicitor or banker) for any policy monies payable to the said trustees or trustee, pursuant to the provisions of the 2nd section of the Trustee Act, 1888 (*k*)]; and any trustee so employed or acting shall be entitled to and be paid all usual or proper professional or other charges for any business or act done by him or his firm in the premises, whether in the ordinary course of his profession or business or not, and although not of a nature requiring the employment of a solicitor or other professional person.

Trustee clauses: power to appoint new trustees;

special indemnity;

power for professional trustees, &c., to charge for services.

IN WITNESS, &c.

(*jj*) See as to this, *ante*, p. 278.

(*k*) It may be advisable to insert the express authority in brackets, to prevent any doubts that might arise as to whether these statutory provisions extend to a trustee-solicitor or trustee-banker: see *ante*, p. 339.

II. Of Shares and Bonds belonging to Husband.

II. *SETTLEMENT ON MARRIAGE, (without Recitals) of* RAILWAY SHARES, &c., *and* FOREIGN BONDS *passing by Delivery,* BELONGING TO *the intended* HUSBAND: USUAL TRUSTS *for the* HUSBAND *for Life, for the* WIFE *surviving for her Life, and in favour of the* ISSUE *of the Marriage.* ULTIMATE TRUST *for* HUSBAND.

THIS INDENTURE (*l*) made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WITNESSETH that, in pursuance of an agreement entered into upon the treaty for a marriage which is intended shortly to be solemnized between the said [*husband*] and [*wife*], and in consideration of such intended marriage, it is hereby agreed and declared that the said [*trustees*], their executors, administrators, and assigns, shall stand possessed of the railway and other shares, and also of the several bonds and securities specified in the schedule hereunder written respectively and belonging to the said [*husband*], [all which shares, bonds, and securities are according to the average price of the same respectively on the day of the date hereof of the values set opposite thereto respectively in the same schedule, amounting in the whole to the cash value of £—— (*m*)], which shares, bonds, and securities have been respectively transferred into the names of, and delivered unto the said [*trustees*], IN TRUST for the said [*husband*], until the solemnization of the said intended marriage, and thereafter UPON TRUST that the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee"), shall either allow the said shares, bonds, and securities which have been so transferred and delivered to the said [*trustees*] respectively as aforesaid, or any of them, or any part thereof respectively to remain in their present state of investment respectively, or shall upon the request in writing [*or* may with the con-

Parties.

Testatum.

Declaration of trusts of shares and bonds, &c., specified in schedule:

for husband till marriage;

and afterwards to retain present investments or sell and invest proceeds.

(*l*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of the value of the shares, bonds, and securities.

(*m*) It may be convenient to state these particulars in the schedule.

II. Of Shares and Bonds belonging to Husband.

sent] of the said [*husband*] and [*wife*] during their joint lives, and of the survivor during his or her life, and after the death of such survivor at the discretion of the said trustees or trustee, sell or dispose of the same trust premises or any of them or any part thereof respectively, and lay out and invest the moneys to arise therefrom in their or his names or name, or under their or his legal control, in the purchase of any parliamentary or government stock or funds of the United Kingdom, or of any stock or funds secured upon the revenues of British India, or of any colony or dependency of the United Kingdom or of any foreign government or state, or in the purchase of stock of the Bank of England or Ireland, or of the stock of the Metropolitan Board of Works, or of the London County Council, or of debenture stock or guaranteed stock of any county, municipal, or other local or public authority or body in the United Kingdom, or British India, or any colony or dependency of the United Kingdom or any foreign country, or in the purchase of debenture stock or preference stock, or preference shares, or ordinary stock or shares of any railway company in the United Kingdom or British India, or in any colony or dependency of the United Kingdom, or of any foreign country, in actual work and paying a dividend on its ordinary stock or shares, or of any stock or shares of any company in the United Kingdom having the liability of its members limited by the Companies Act, 1862, or some other Act of Parliament relating to joint stock companies; Or at interest upon securities of the government of the United Kingdom, or upon freehold, copyhold, leasehold, or chattel real securities in the United Kingdom, or at interest upon any securities of, or guaranteed by any government, or upon the security of any real or immoveable property either together with or without any moveable property, in British India, or any colony or dependency of the United Kingdom, or any foreign country, or at interest upon the debentures, mortgages or securities of any county, municipal, local public authority or body, or of any railway or other company in the United Kingdom or British India, or any colony or dependency of the United Kingdom or any foreign country, or on the securities of rates or tolls made or levied by any such authority or body as aforesaid, or at interest upon charges created under the

Investment clause (*n*).

(Comprehensive range.)

(*n*) For other forms of investment clauses, see *ante*, p. 545 and *post*, p. 558. And as to investment of trust funds generally, see *ante*, pp. 225 *et seq.*, and *post*, pp. 794 *et seq.*

II. Of Shares and Bonds belonging to Husband.

Improvement of Land Act, 1864, or any mortgages thereof, or upon debentures issued under the Mortgage Debenture Act, 1865, or at interest upon the security of a life interest upon any such real or personal property as aforesaid, coupled with a policy of assurance on the life of the person on whose death such life interest will determine; AND shall at such request, or may at such discretion as aforesaid respectively, as the case may be, from time to time vary, &c. (*continue ut ante*, p. 545; *or insert power to vary investments*, *ibid.*): PROVIDED ALWAYS that any investment made under the trust or power in that behalf hereinbefore contained on mortgage may be made subject to any prior charges or incumbrances affecting the property mortgaged, or may be made to or in favour of the said trustees or trustee jointly with any other persons or person by way of contributory mortgage to be taken either in the names or name of any other persons or person in trust for the contributories or otherwise as the said trustees or trustee shall think expedient: PROVIDED ALSO that the said trustees or trustee may apply any part of the capital of the said trust premises in or towards payment of the calls on any shares for the time being forming part of the same premises; PROVIDED ALWAYS, and it is hereby agreed and declared that any deeds, securities, or other documents, including securities to bearer, from time to time held by the said trustees or trustee as trustees or trustee of these presents may [*or* shall] be deposited by them or him with any banker, or banking firm or company, or other company whose business it is to take charge of such documents, for safe custody or receipt of dividends, without being responsible for any loss occasioned by or by reason of such deposit; and the said trustees or trustee may pay out of the income of the trust premises any sum payable on account of such deposit, safe custody or receipt of dividends as aforesaid: AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall pay the income of the said railway and other shares, bonds, and securities, and of the investments for the time being representing the same respectively (which shares, bonds, securities and investments are hereinafter referred to as "the said trust fund") unto the said [*husband*], and his assigns during his life: And from and after the death of the said [*husband*], shall pay the income of the said trust fund to the said [*wife*] if she shall survive him, during her life, for her separate use, but so that she

Power to lend on second mortgages and contributory mortgages.

Power to pay calls on shares.

Power to deposit deeds and securities for safe custody.

Trusts of income for husband for life;

for wife surviving for life;

II. Of Shares and Bonds belonging to Husband.

shall not, during the said intended coverture, have power to dispose of or charge such reversionary life interest by way of anticipation: AND from and after the death of the survivor of them, the said [*husband*] and [*wife*] shall stand possessed of the said trust fund and the income thereof, IN TRUST for all or any of the children or remoter issue of the said intended marriage in such shares, and generally in such manner as the said [*husband*] and [*wife*] shall by any deed or deeds revocable or irrevocable jointly appoint: AND in default of and subject to any such appointment then as the survivor of them the said [*husband*] and [*wife*] shall in like manner or by will or codicil appoint; And in default of and subject to any appointment under the respective powers hereinbefore contained: IN TRUST [*trust for children in default of appointment; hotchpot clause; power of advancement, ante*, p. 547]: AND IT IS HEREBY AGREED AND DECLARED that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry [with such consent as aforesaid], then, subject to the trusts and powers hereinbefore declared and contained, or by law vested in the said trustees or trustee, they or he, the said trustees or trustee shall stand possessed of the said trust fund and the income thereof, or so much thereof as shall not have become vested or been applied under any of such trusts or powers, IN TRUST for the said [*husband*] absolutely (*o*): PROVIDED ALWAYS, and it is hereby agreed that if the said [*husband*] shall at any time or times be desirous of withdrawing from the settlement hereby intended to be created, all or any of the said railway shares, bonds and securities specified in the said schedule hereunder

remainder for issue as husband and wife shall appoint (*short form*);

remainder as survivor shall appoint;

trusts in default of appointment, &c.

Ultimate trust for husband in default of issue.

Proviso that settlor may withdraw securities from settlement, substituting others (*p*).

(*o*) Sometimes a proviso to the following effect is here inserted: "PROVIDED NEVERTHELESS that, if there shall be no such child of the said intended marriage as aforesaid, then the said trustees or trustee shall upon the failure or in default of such issue, set apart and appropriate one moiety of the said trust fund, and pay the income thereof to the said [*wife*], if she shall survive the said [*husband*], during her life in manner aforesaid, and shall hold the other moiety of the said trust fund IN TRUST for the executors or administrators of the said [*husband*] as part of his personal estate."

Proviso giving widow, in default of issue, only one moiety of income of the trust fund.

(*p*) This proviso will not, of course, be inserted in the absence of special instructions.

II. Of Shares and Bonds belonging to Husband.

written, or the stocks, funds, shares, or securities by which the same shall under or by virtue of the trusts or powers of investment and varying investments hereinbefore contained respectively, or of this provision be represented, or any part or parts thereof respectively, he shall be at liberty so to do, substituting from time to time to the satisfaction of the said trustees or trustee other stocks, funds, shares or securities which in the estimation of the said trustees or trustee shall be of equivalent value: [*Trustee Clauses, ante*, p. 552].

In witness, &c.

The Schedule above referred to.

III. *SETTLEMENT on* Marriage *of a* Policy *of* Insurance *effected on the* Life *of the intended* Husband *in his own name for the benefit of the intended Wife and the Issue of the Marriage.*

THIS INDENTURE (*pp*) made the —— day of ——, 18—, Between [*intended husband*] of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: Whereas [*recite intended marriage, ante*, p. 544]: And whereas the said [*husband*] is absolutely entitled to a policy of assurance effected by him on his own life and in his own name for the sum of £——, with the —— Life Assurance Society, dated the —— day of ——, 18—, and numbered ——, and under the annual premium of £——, and upon the treaty for the said marriage it was agreed that the same policy should be assigned to the said [*trustees*] in manner hereinafter appearing upon the trusts and with and subject to the powers and provisions hereinafter contained of and concerning the same: Now this Indenture Witnesseth that, in pursuance of the said agreement and in consideration of the said intended marriage the said [*husband*] with the approbation of the said [*wife*] (hereby testified) hereby assigns, and as settlor conveys unto the said [*trustees*], their executors, administrators and assigns, All the said policy of assurance on the life of the said husband in the said —— Life Assurance Society to which he is so entitled as aforesaid, and the said sum of £—— thereby assured, and all

Parties.

Recitals: of title to policy, and agreement for settlement thereof.

Testatum.

Assignment of policy to trustees (*q*).

(*pp*) Stamp, 5*s.* per 100*l.* or part of 100*l.* on the sum assured by the policy.

(*q*) Notice of this assignment should be given to the society.

III. Of Policy on Life of Husband.

Habendum.

In trust for husband till marriage, and afterwards on trusts declared.

Declaration of trusts of policy monies :

trust for investment :

monies to be recovered or received under or by virtue of the said policy by way of bonus or otherwise To HOLD the same unto the said [*trustees*], their executors, administrators, and assigns, UPON TRUST for the said [*husband*] until the solemnization of the said intended marriage and thereafter upon the trusts, and with and subject to the powers and provisions hereinafter declared concerning the same, AND it is hereby declared that, if the said intended marriage shall be solemnized, the said trustees and the survivor of them, or the executors or administrators of such survivor, or other trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall upon the death of the said [*husband*] receive all the monies assured by or to become payable under or by virtue of the said policy; and shall with the consent in writing of the said [*wife*] during her life, and, after her death, at the discretion of the said trustees or trustee invest the same in the name or names or under the legal control of them

investment clause (*q*) (fair range) ;

the said trustees or trustee in the purchase of any parliamentary or government stock or funds of the United Kingdom, or of any stock secured upon the revenues of British India, or of any colony or dependency of the United Kingdom, or of stock of the Bank of England or Ireland, or of stock of the Metropolitan Board of Works, or of the London County Council, or of debenture stock of any county, municipal, or local authority in Great Britain, but not in Ireland, or in the purchase of the debenture stock, or preference stock, or preference shares of any railway or other company in the United Kingdom incorporated or established by charter or an Act of Parliament in actual work and paying a dividend upon its ordinary stock or shares, or of the stock or shares of any railway company in the United Kingdom or India on which a fixed or minimum rate of dividend is guaranteed by the same or any other company or by the government of British India or any colony or dependency of the United Kingdom, or guaranteed by means of a fixed rental payable by any other company; Or at interest upon securities of the government of the United Kingdom, or upon freehold, copyhold, leasehold or chattel real securities in England or Wales, but not in Ireland (*qq*), or in or upon the bonds or securities of

(*q*) For other forms of investment clauses, see *ante*, pp. 545, 554, and *post*, p. 562. As to investment of trust funds generally, see *ante*, pp. 225 *et seq.*

(*qq*) See the Trustee Investment Act, 1889 (52 & 53 Vict. c. 32), sect. 3, set out fully, *post*, p. 794.

III. Of Policy on Life of Husband.

any of the British colonies or dependencies, including bonds or debentures secured upon or guaranteed by the revenues of British India, or any bonds or securities which or the interest upon which are or is guaranteed by parliament, or at interest upon the debentures or mortgages of any railway or other company in the United Kingdom incorporated by charter or Act of Parliament, and paying a dividend as aforesaid, but being a company having the liability of its members limited by the Companies Act, 1862, or any other Act relating to joint-stock companies, or upon the bonds, debentures or securities of or issued by any such county, municipal, or local authority as aforesaid, or on the security of rates or tolls made or levied by any such authority. [*Power to vary investments, ante*, p. 545]: And shall pay the income of the said policy monies, and of the investments for the time being representing the same (which monies and investments are hereinafter called "the said trust fund"), unto the said [*wife*] during her life, for her separate use, but so that she shall not, during the now intended coverture, have power to dispose of or charge such reversionary life interest by way of anticipation: And from and after the death of the said [*wife*] shall stand possessed of the said trust fund and the income thereof In Trust, &c., [*for issue of marriage as husband and wife shall jointly appoint; remainder as survivor shall appoint; in default of appointment for children equally at twenty-one or marriage; hotchpot clause; power of advancement, ante*, p. 547; *ultimate trust in default for husband absolutely ante*, p. 556]: And the said [*husband*] hereby covenants with the said [*trustees*], that if the said intended marriage shall be solemnized, he, the said [*husband*], will not do or suffer or omit to do any act whereby the said policy or any other policy to be effected as hereinafter mentioned may become void or voidable: And that if such policy shall become voidable, the said [*husband*] will immediately, at his own cost, do all things necessary for restoring and keeping on foot the same, and if such policy shall become void, will immediately, at his own cost, effect a new or substituted policy or policies on his life in the names or name of the said trustees or trustee, in an office to be approved of by him or them, for the sum of £—— at the least; And further that he the said [*husband*] will regularly and punctually pay the annual premiums and all other sums of money, if any, which may become payable for keeping on foot the said original

trust of income for wife for life without power of anticipation;

trusts for issue.

Covenants by husband to keep up policy, &c.

III. Of Policy on Life of Husband.

policy and any new or substituted policy or policies, and will from time to time deliver to the said trustees or trustee the receipt for every such payment within —— days after the same shall have become payable: And in case he shall at any time refuse, neglect or omit to pay, produce, restore, or effect any such premium, receipt, or policy within the times or manner respectively aforesaid, it shall be lawful for, but not obligatory upon the said trustees or trustee, to pay the premium, or to restore the policy to which any such default, refusal, neglect, or omission shall relate, or to effect any such new or substituted policy or policies as aforesaid in lieu thereof; And further that the said [*husband*], his heirs, executors, or administrators will on demand repay to the said trustees or trustee, all monies which they or he shall disburse for any of the purposes aforesaid, with interest thereon at the rate of —— per cent. per annum, until payment thereof; And will do and concur in all acts to enable them and him to effect any such new or other policy as aforesaid; And that every new policy to be effected as hereinbefore provided, and the monies to become payable thereunder, shall be held and applied upon the trusts and with and subject to the powers and provisions hereby declared and expressed concerning the said original policy and the monies to become payable thereunder; PROVIDED ALWAYS and it is hereby agreed and declared, that any monies which may be from time to time received by the said trustees or trustee by way of bonus in respect of the said policy hereby assigned, or any such substituted policy or policies as aforesaid, may (so far as the rules and regulations of the said Assurance Society for the time being in force may permit) be at the option of the said [*husband*] applied wholly or in part in reduction of the premiums upon such policy, and in default of or subject to such option, any such monies shall be added to the said policy hereby assigned, and be held upon, with, and subject to the same trusts, powers, and provisions as are herein declared and contained of the monies assured by the same policy, and the investments for the time being representing the same: PROVIDED ALSO and it is hereby further agreed and declared, that the said trustees or trustee may, with the consent in writing of the said [*wife*] during her life, and after her death at the absolute discretion of the said

Proviso that bonuses may be applied in reduction of premiums, or added to policy.

Power for trustees to sell or surrender policy, and accumulate proceeds (*r*).

(*r*) The husband being the settlor, the trust for accumulation

III. Of Policy on Life of Husband.

trustees or trustee, if they or he shall consider it expedient so to do, sell or dispose of the said policy hereby assigned, or any such substituted policy or policies as aforesaid, either by way of surrender to the Society or Societies by whom the same may have been granted respectively or otherwise; And in the event of and after any such sale or disposition the said trustees or trustee shall hold the net proceeds of such sale or disposition upon trust during the then residue of the life of the said [*husband*], to accumulate the income of the same, from time to time, in the way of compound interest by investing the same income and the resulting income thereof upon any one or more of the stocks, funds, shares, or securities hereinbefore authorised for investment; And from and after the death of the said [*husband*] shall hold such accumulated fund and the income thereof upon the trusts, and with and subject to the powers and provisions hereinbefore declared and contained concerning the monies assured by the said policy hereby assigned, and the investments for the time being representing the same, and the income thereof respectively: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall not be chargeable or responsible for any omission or neglect to enforce any of the covenants hereinbefore contained in relation to the said policy hereby assigned, or any such substituted policy or policies as aforesaid, or to see that the same respectively are kept in force or restored, or for or by reason of any policy or policies lapsing or becoming void by any means whatsoever. [*Trustee clauses, ut ante*, p. 552.]

Proviso for indemnity of trustees.

IN WITNESS, &c.

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will not operate beyond the life of the settlor, and therefore is not within the mischief of the Thellusson Act: see *post*, sub tit. "WILLS," Vol. VII., p. 448.

The following is an alternative form; after the power to sell or surrender the policy continue as follows:—

"And in the event of and after any such sale or disposition the said trustees or trustee shall, although the said [*husband*] shall then be living, hold the net proceeds of such sale or disposition upon the trusts and with and subject to the powers and provisions hereinbefore declared concerning the monies assured by the said policy hereby assigned, and the investments for the time being representing the same, to take effect after the death of the said [*husband*], and as if he were then actually dead."

IV. *SETTLEMENT ON MARRIAGE of a* SUM OF MONEY *secured by the* COVENANT *of the Lady's* FATHER, *payable within a year after his Death.* TRUST *of* INCOME *for* WIFE *for her Life. Power to the* WIFE *to* BEQUEATH *a* LIFE-INTEREST *to any* HUSBAND. TRUSTS *after Death of* WIFE *in favour of her* CHILDREN *by any* MARRIAGE *as she shall* APPOINT; *and in default of* APPOINTMENT *for such* CHILDREN *in* EQUAL SHARES.

Parties.

THIS INDENTURE (*s*), made the —— day of ——, BETWEEN [*father*], of &c., of the first part; [*intended wife*], spinster, daughter of the said [*father*], of the second part; [*intended husband*], of &c., of the third part; and [*trustee*], of &c., and [*trustee*], of &c., of the fourth part: WITNESSETH, that, in contemplation of a marriage between the said [*wife*] and [*husband*], the said [*father*] hereby covenants with the said [*trustees*], that, if the said marriage be solemnized, the executors or administrators of the said [*father*] shall, within twelve calendar months after his decease, pay unto the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, or other the trustees or trustee for the time being under these presents (hereinafter called "the said trustees or trustee"), the sum of £——; AND that the said [*father*], his executors or administrators, will, on every —— day of —— and —— day of —— after such marriage, until the said principal sum shall be paid, pay unto the said trustees or trustee interest after the rate of 4 per cent. per annum, from the day of such marriage, on the said principal sum of £——, and a proportional part of such interest from the last of such days to the day of payment of the said principal sum; PROVIDED ALWAYS that the said [*father*] shall be at liberty to pay the said sum of £——, or any part thereof, to the said trustees or trustee at any time or times in his lifetime: AND IT IS HEREBY AGREED, that the said trustees or trustee shall upon receipt of the said principal sum, with the consent in

Testatum.

Covenant by father to pay money, *post obit*;

and interest in the meantime.

Investment clause (*t*). (Restricted range.)

(*s*) Stamp, 5*s.* per 100*l.*, or part of 100*l.*, on the sum secured by the covenant.

(*t*) For other forms of investment clauses, see *ante*, pp. 545, 554 and 558. As to investments of trust funds generally, see *ante*, pp. 225 *et seq.*; and *post*, pp. 794 *et seq.*

IV. Of Sum Secured by Covenant.

writing of the said [*wife*], or, after her decease, at their or his discretion, invest the same in their or his names or name, in the purchase of any parliamentary or government stocks or funds of the United Kingdom, or of any stock secured upon the revenues of British India, or of stock in the Bank of England or Ireland, or of the Metropolitan Board of Works, or of the London County Council, or in the purchase of the debenture stock, or preference stock or preference shares of any railway or other company in Great Britain or Ireland incorporated or established by charter or special Act of Parliament, and in actual work and which shall during the ten preceding years have paid a dividend of not less than 2 per cent. per annum on its ordinary stock or shares; Or at interest upon any government securities of the United Kingdom or British India, or upon the security of any freehold, copyhold, or long leasehold security in England or Wales, but not in Ireland (*tt*), but so that every such long leasehold security shall be on property wherein a term of not less than sixty years shall be unexpired at the date of such security, or at interest upon the security of bonds, debentures, or mortgages of any such railway or other company as aforesaid, [or in the purchase of, or at interest upon any stocks, funds, or securities which may for the time being be authorised for the investment of trust funds or of cash under the control of the Chancery Division], but not in any other mode of investment. [*Power to vary investments, ante*, p. 545]. And shall pay the interest to be received by virtue of the foregoing covenant, and other the income from the said trust-premises, to the said [*wife*], during her life, for her separate use, but without power of anticipation during any coverture; And, after her decease, shall, if she should so by will direct, pay all or any part of the income from the trust-premises unto any her surviving husband, during his life, or for any shorter period; And, subject thereto, shall transfer the said trust-premises unto such child or children or other issue of the said [*wife*], whether by her now intended or any future husband, and in such proportions and manner as she shall (notwithstanding any coverture) by deed or will appoint; And, subject thereto, shall transfer the said trust-premises unto such child or

Income to wife without power of anticipation.

Power to bequeath life-interest to husband;

to appoint capital to children.

Trusts in default of appointment.

(*tt*) See *ante*, p. 559, note. The omission of the words in brackets will greatly restrict the range of investments. See *post*, p. 800.

IV. Of Sum Secured by Covenant.

children of the said [*wife*] as shall attain the age of twenty-one, or marry under that age, if more than one, in equal shares; AND, if there be no such child, shall hold the unappointed and unapplied trust-premises IN TRUST for the said [*father*] his executors, administrators, and assigns. [*Hotchpot clause and power of advancement, ante*, p. 547; *and trustee clauses, ante*, p. 552.]

IN WITNESS, &c.

V. *TRANSFER OF MORTGAGE (by Endorsement on the Mortgage-deed) previously to* MARRIAGE, *upon* TRUSTS *which are declared by a* SEPARATE DEED *of* SETTLEMENT.

Parties (*v*).

THIS INDENTURE (*u*), made the —— day of ——, 18—, BETWEEN [*intended wife and mortgagee*], of, &c., of the first part; [*intended husband*], of, &c., of the second part; [*mortgagor*], of, &c., of the third part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the fourth part: WHEREAS [*recite intended marriage, ante*, p. 544]; AND WHEREAS the within-mentioned sum of £—— is still due and owing to the said [*wife*] upon the security of the within-written indenture, but all interest for the same has been paid up to the —— day of —— last, as the said [*mortgagor*] and [*wife, &c.*] do hereby respectively acknowledge; AND WHEREAS on the treaty for the said intended marriage it was agreed, amongst other things, that the said principal sum of £——, and all interest due and to become due thereon, and the securities for the same, should be transferred unto the said [*trustees*] in manner hereinafter mentioned, upon and for the trusts and purposes, and with and subject to the powers, agreements, and declarations hereinafter declared or referred to of and concerning the same: NOW THIS INDENTURE WITNESSETH, that in

Recitals: that mortgage money is still owing;

agreement to settle.

First *testatum*.

(*u*) Stamp, 6*d*. per 100*l*., or part of 100*l*. of the amount transferred.

(*v*) As to the advisability of obtaining the concurrence of the mortgagor, see *ante*, sub tit. "MORTGAGES," Vol. III., p. 960. If his concurrence cannot be obtained this transfer must be modified accordingly; compare the form of transfer given in Vol. III., Prec. LXXXI., at p. 1202.

V. Transfer of Mortgage on Marriage.

pursuance of the said agreement, and in consideration of the said intended marriage, the said [*wife*, *&c.*], with the approbation of the said [*husband*], and also with the privity of the said [*mortgagor*] (testified by their respective execution hereof), hereby assigns [and as mortgagee conveys (*x*)] unto the said [*trustees*], their executors, administrators, and assigns, ALL THAT the said principal sum of £—— secured by the within-written indenture, and all interest due and to become due for the same sum, and the full benefit of all covenants and other securities for the payment of the said principal sum and interest (*y*), TO HOLD all the premises hereinbefore expressed to be hereby assigned, UNTO the said [*trustees*], their executors, administrators, or assigns, IN TRUST for the said [*wife*], her executors, administrators, and assigns, until the said intended marriage shall be solemnized, And after the solemnization thereof, UPON SUCH TRUSTS, and with and subject to such powers, agreements,

Assignment of mortgage monies.

Habendum.

Trust for wife till marriage, then on trusts declared by deed of even date.

(*x*) The mortgagee is here made to convey the mortgage debt and benefit of the mortgage "as mortgagee" in accordance with what seems to be now the usual practice: see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), Sched. III., Part II., Forms A, B, and C; Wolst. & Turn. Conv. Acts, Prec. XXV., p. 300; Key & Elph. Conv. Prec., Vol. II., p. 216, &c.; Prid. Conv. (14th Ed.), Vol. I., p. 647, &c.; and see *ante*, Vol. III., pp. 1202, &c. And it is conceived that these words will effectually import the statutory covenant against incumbrances as regards the sum secured by the mortgage. Mr. Vaizey, however, objects to this practice, on the ground that, strictly speaking, the transferor is the beneficial owner of the debt, and cannot be accurately expressed to convey it as mortgagee: see his Precedents of Settlements, at p. 249. If, therefore, the draftsman prefers, he may omit the words in brackets both from the assignment of the debt and the conveyance of the mortgaged property, and may insert in a later part of the deed an express covenant by the transferor that she has not incumbered: see *post*, p. 566, note (*a*). This seems to be in accordance with the more usual practice before 1882: see Dav. Con. (2nd. ed.) Vol. II. p. 1048; *ibid.*, Vol. III. p. 592; Prid. Conv. (7th ed.), p. 629. Sometimes, however, in a transfer on marriage, the transferor was made to enter into an ordinary vendor's covenants for title as to the debt: see Byth. & Jarm. Conv. (2nd ed.), Vol. IX., p. 148; and, if preferred, these covenants may be implied, by virtue of the statute, by expressing the transferor to convey the debt, interest, and benefit of the mortgage "as beneficial owner."

(*y*) No power of attorney is required, as the mortgagor is a party to the deed; nor is it required, if he is not a party, provided that notice is given to him of the transfer: see the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25 (6).

V. Transfer of Mortgage on Marriage.

and declarations as are or shall be expressed or declared conveying the same in an indenture already prepared and engrossed, bearing or intended to bear even date herewith, and made or intended to be made between the said [*husband*], of the first part, the said [*wife, &c.*], of the second part, and the said [*trustees*] of the third part: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and in consideration of the said intended marriage, she the said [*wife, &c.*], with the approbation and privity of the said [*husband*] and [*mortgagor*] respectively (testified as aforesaid) hereby grants [and as mortgagee conveys (*z*)] unto the said [*trustees*], their heirs and assigns, ALL those the within-mentioned messuages, lands, tenements, or other hereditaments comprised in or expressed to be granted and conveyed by the within-written indenture, with their respective rights, easements, and appurtenances, TO HOLD all other the premises hereinbefore expressed to be hereby granted, UNTO AND TO THE USE of the said [*trustees*], their heirs and assigns for ever, subject to the equity of redemption now subsisting therein under the within-written indenture (*a*) [*Power to appoint new trustees, ante*, p. 552].

Second *testatum.*

Grant of lands comprised in security.

IN WITNESS, &c.

(*z*) If preferred the words in brackets may be omitted, and an express covenant may be inserted in a later part of the deed: see *ante*, p. 565, note (*x*).

(*a*) If thought advisable, having regard to the doubt suggested as to the accuracy of the words "as mortgagee conveys" as applied to the mortgage debt and interest, those words may be omitted from the operative parts of the deed, and the following express covenant against incumbrances may be here inserted:

Covenant by wife against incumbrances.

"AND the said [*wife*] hereby covenants with the said [*trustees*] that she the said [*wife*] has not done or knowingly suffered or been party or privy to any act or thing whatsoever whereby or by reason whereof she is prevented or hindered from assigning the said principal sum and interest and premises hereinbefore expressed to be hereby assigned, or any part thereof, unto the said [*trustees*], their executors, administrators, and assigns, in manner and upon the trusts assigned, or from granting and conveying the said hereditaments and premises hereinbefore expressed to be hereby granted and conveyed, or any part thereof."

VI. *SETTLEMENT ON MARRIAGE of a* SUM *secured by a* MORTGAGE, *which has been transferred to the Trustees by a Deed of even date (see last Precedent), and of a further* SUM *secured by a* BOND, *both sums being the Property of the intended Wife.* TRUSTS *in favour of the* WIFE *for Life, then the* HUSBAND *for Life, then of the* CHILDREN *of the Marriage, Daughters to have shares double of those of Sons.* TRUST, *in Default of Children, for* WIFE'S BROTHER CHARGED *with an* ANNUITY *in favour of the* WIFE'S SISTER *during her* LIFE. POWER *for* WIFE *to* BORROW *a Part of the* TRUST FUNDS, *insuring her Life.* TRUSTS *of* INSURANCE MONEYS. POWER *for* TRUSTEES *to accept* COMPOSITION *in respect of the* BOND-DEBT.

THIS INDENTURE (*b*), made the —— day of ——, 18—, BETWEEN [*intended husband*] of, &c., of the first part; [*intended wife*] of, &c., of the second part; and [*trustee*] of, &c., and [*trustee*] of, &c., of the third part: WHEREAS [*recite intended marriage, ante*, p. 544]; AND WHEREAS the said [*wife*] is entitled to the principal sum of £——, secured to her with interest after the rate of — per cent. per annum by an indenture of mortgage dated the —— day of —— 18—, and made between the [*mortgagor*] of the one part and [*wife*] of the other part; and is also entitled to the principal sum of £——, secured to her with interest after the rate of — per cent. per annum, by a bond dated the —— day of —— 18—, under the hand and seal of [*wife's brother*]: AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said [*wife*] should assign the said principal sums of £——, and £——, and the interest due and to become due thereon, and the securities for the same respectively, unto the said [*trustees*] upon the trusts and with and subject to the powers, declarations and agreements hereinafter declared and contained concerning the same: AND WHEREAS in pursuance of the said agreement, and by an indenture bearing even date herewith but executed before the execution hereof, and made

Recitals: of intended marriage; wife entitled to sum secured by mortgage and sum secured by bond;

agreement to settle;

transfer of the mortgage by trustees by deed.

(*b*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of amounts secured by the mortgage and bond, and 10*s.* in respect of the declaration of trusts of insurance moneys.

VI. Of Mortgage-debt and Bond-debt belonging to Wife.

between the said [*wife*] of the first part, the said [*husband*] of the second part, the said [*mortgagor*] of the third part, and the said [*trustees*] of the fourth part, the said [*wife*], with the approbation of the said [*husband*] and also of the said [*mortgagor*], has assigned unto the said [*trustees*], their executors, administrators and assigns, the said principal sum of £——, and the interest due and to become due thereon, To HOLD the same unto the said [*trustees*], their executors, administrators and assigns: IN TRUST for the said [*wife*], her executors, administrators and assigns, until the said intended marriage should be solemnized, and after the solemnization thereof: UPON and for such trusts and purposes, and with, under, and subject to such powers, agreements, and declarations as were or should be declared and contained concerning the same in and by an indenture therein referred to, meaning thereby these presents, and by the said indenture now in recital the said [*wife*], with the privity and approbation of the said [*husband*] and also of the said [*mortgagor*], has granted and conveyed the hereditaments comprised in the said indenture of mortgage of the —— day of ——, 18—, unto and to the use of the said [*trustees*], their heirs and assigns, Subject to the equity of redemption now subsisting therein under the said indenture of mortgage: NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said agreement, and in consideration of the said intended marriage, the said [*wife*], with the privity and approbation of the said [*husband*], (hereby testified) assigns, and as settlor conveys unto the said [*trustees*], their executors, administrators and assigns, ALL THAT the said principal sum of £—— secured by a bond of the said [*wife's brother*], and all interest due and to become due for the same, together with the said bond and the full benefit thereof: To HOLD the said principal sum and premises unto the said [*trustees*], their executors, administrators and assigns, IN TRUST for the said [*wife*] until the said intended marriage shall be solemnized, and after the solemnization thereof, UPON THE TRUSTS and with and subject to the powers, agreements and declarations hereinafter declared and contained concerning the same: AND IT IS HEREBY AGREED AND DECLARED that the said [*trustees*], their executors, administrators and assigns, shall stand possessed of the said several sums of £——, and £——, and

Testatum.

Assignment of money secured by bond.

Habendum.

Trust of monies on mortgage and bond

VI. Of Mortgage-debt and Bond-debt belonging to Wife.

the interest thereof, UPON TRUST that they the said [*trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor or other the trustees or trustee of these presents (hereinafter called "the said trustees or trustee") shall either permit the said several sums respectively to remain in their present states of investment, or shall with the consent in writing of the said [*wife*] during her life, and after her decease with the consent in writing of the said [*husband*] during his life, and after his decease at the discretion of the said trustees or trustee, call in and compel payment of the said several sums or either of them or any part thereof respectively, and invest the monies to arise thereby in their or his names or name, &c. [*investment clause, ante*, pp. 545, 554, 558 *or* 562; *and power to vary investments, ante*, p. 545]; AND SHALL during the joint lives of the said [*husband*] and [*wife*] pay the income of the said trust monies, stocks, funds and securities (which are hereinafter collectively called "the said trust funds") to the said [*wife*], for her separate use, but without power of anticipation: AND from and after the death of such one of them, &c., [*continue trust for survivor, ut ante*, p. 546]: AND from and after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of the said trust funds and the income thereof, IN TRUST for all and every and such one or more exclusively of the other or others of the children of the said intended marriage, at such age or time or respective ages or times, and if more than one in such shares, with such provisions, maintenance and education and advancement, and such future or executory or other trusts for the benefit of the said children or some or one of them, and subject to such conditions and restrictions, and in such manner and in all respects as the said [*wife*] shall at any time or times by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil, from time to time or at any time appoint: AND in default of any such appointment and so far as no such appointment shall extend, IN TRUST for all and every the children or child of the said intended marriage who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, to be divided between or among such children if more than one in equal shares, except that if any one or more of them shall be a son or sons or any other or others shall be a

to continue investments;

call in monies;

and re-invest;

to pay income to wife without power of anticipation during joint lives;

to pay income to survivor.

Trust for children as wife shall appoint;

in default of appointment trust for children, daughters to take double shares.

VI. Of Mortgage-debt and Bond-debt belonging to Wife.

daughter or daughters, then the share of such daughter shall be of double the amount or value of the share of each son: [*Hotchpot clause; power of advancement, ante*, p. 547.] PROVIDED ALWAYS, and it is hereby further agreed and declared, that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, the said trustees or trustee shall after such default or failure of issue of the said intended marriage as aforesaid, but subject and without prejudice to such of the trusts hereinbefore declared as shall for the time being be subsisting or capable of taking effect, stand possessed of and interested in the said trust funds, and the income thereof, or of so much thereof respectively as shall not have become vested or been applied under any of the trusts or powers herein contained, or by law vested in the said trustees or trustee, IN TRUST for the said [*wife's brother*], his executors, administrators, and assigns, but subject to and charged with the payment to [*wife's sister*] during her life of the clear annual sum of £——, the same to be paid by the said trustees or trustee out of the income of the said trust funds by equal half-yearly payments in every year, the first half-yearly payment thereof to be made at the expiration of six calendar months from the time at which the trust hereinbefore declared in favour of the said [*wife's brother*], his executors, administrators, and assigns, shall take effect in possession, and the subsequent half-yearly payment thereof to be made at successive intervals of six calendar months each: PROVIDED ALWAYS, and it is hereby further agreed and declared, that if the said [*wife*] shall at any time after the solemnization of the said intended marriage, by any writing or writings under her hand require the said trustees or trustee to raise and pay to her out of the said trust funds any sum or sums of money not exceeding in the whole the sum of £——, and shall effect at her own expense in the names or name of the said trustees or trustee at such office or offices as they or he shall appoint an assurance or assurances on her life for the sum or sums so required to be raised and paid, and shall deliver to them or him the policy or policies of such assurance or assurances, Then and in every such case the said trustees or trustee shall raise and pay the same sum or sums accordingly: AND it is hereby agreed and declared that the said trustees or trustee

If there shall be no child.

Trust for wife's first brother charged with an annual sum.

Power for wife to borrow sum of funds on insuring her life to the amount.

Trust of policy as

VI. Of Mortgage-debt and Bond-debt belonging to Wife.

shall stand possessed of and interested in the sum or sums of money to be assured by any such policy or policies as aforesaid or otherwise to become payable by virtue thereof, and the stocks, funds and securities in or upon which the same may be invested and the income thereof respectively, Upon the same trusts and with and subject to the same powers, agreements and declarations as are hereinbefore declared and contained concerning the said trust funds out of which the sum or sums to be so paid to the said [*intended wife*] as aforesaid shall have been raised and the interest and annual produce thereof: And further that the said trustees or trustee shall, during the life of the said [*wife*], pay all premiums and other monies which shall from time to time become payable for keeping on foot any such policy or policies as aforesaid out of the income of the said trust funds [*Trustee clauses, ante*, p. 552]: Provided always, and it is hereby agreed and declared, that, without prejudice to any statutory power of compounding debts, it shall be lawful for the trustees or trustee for the time being of this settlement, if they or he in the exercise of their or his absolute discretion shall think it expedient, to accept a composition in satisfaction of the said bond debt of such amount and upon such terms as to the time of payment or otherwise as they or he shall think proper, and upon payment of the same debt or any composition in respect thereof, to execute valid or effectual releases for same, and that it shall not be incumbent on them or him to institute or maintain any legal proceedings for the recovery of the same debt or any part thereof except at such time or times and in such manner as they or he shall think proper, and that no such proceedings shall be taken during the lives of the said [*wife*] and [*husband*], or the life of the survivor of them except upon their, her or his request in writing for that purpose.

the money borrowed.

Premiums to be paid by trustees out of trust funds.

Power for trustees to accept a composition for debt secured by bond so as to provide for the indemnity of the trustees and to protect the debtor from molestation.

In witness, &c.

VII. *ASSIGNMENT ON MARRIAGE of a* PORTION *belonging to the Intended Wife, raisable out of Settled Lands, of which her Eldest Brother is Tenant for Life, to the* TRUSTEES, *to be held by them upon the* TRUSTS *of an* INDENTURE OF SETTLEMENT *of even date* (*c*).

THIS INDENTURE (*d*), made the —— day of ——, 18—,

Parties. BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part:

Recitals: of intended marriage; WHEREAS [*recite intended marriage, ante*, p. 544];

of wife's title to portion; AND WHEREAS under or by virtue of an indenture of settlement dated, &c., and made between [*parties*] (being a settlement of lands and hereditaments situate at ——, in the county of ——, of which [*brother*], the eldest brother of the said [*wife*], is now tenant for life in possession under the same settlement), and by virtue of the trusts of a term of —— years by the same indenture limited in the said lands and hereditaments for raising portions for the daughters and younger sons of the said [*wife's father*] and [*wife's mother*], both since deceased, and by virtue of an appointment in exercise of a power in that behalf contained in the said indenture of settlement made by the will of the said [*wife's father*], dated, &c., and proved, &c., the said [*wife*] is absolutely entitled to the sum of £——, raisable out of the said lands and hereditaments, and now payable to her, but which has not yet been raised and paid, with interest until payment at the rate of 4 per cent. per annum and all interest on the said sum has been paid up to the —— day of ——

of agreement for assignment of portion. now last past; AND WHEREAS, upon the treaty for the said intended marriage it was agreed that the said portion or sum of £—— should be assigned to the said [*trustees*] in manner hereinafter appearing, upon the trusts hereinafter declared and contained concerning the same:

Testatum. NOW THIS INDENTURE WITNESSETH,

Assignment of portion. that in pursuance of the said agreement in this behalf, and in consideration of the said intended marriage, the said [*wife*], with the approbation of the

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(*c*) Notice of this assignment should be given to the trustees of the original settlement.

(*d*) Stamp, 10*s*.

said [*husband*] (hereby testified), hereby assigns, and as settlor conveys unto the said [*trustees*], their executors, administrators, and assigns, All that the said portion or sum of £——, to which the said wife is entitled as aforesaid, raisable by virtue of the trusts of the said term of —— years limited by the said indenture of settlement, and by virtue of the said will of the said [*wife's father*] as hereinbefore recited, and all interest now or to become payable in respect of the same sum, To HOLD the premises hereby assigned unto the said [*trustees*], their executors, administrators, and assigns, IN TRUST for the said [*wife*] until the said intended marriage shall take place, AND thereafter UPON SUCH TRUSTS, and with and subject to such powers and provisions as are declared and contained concerning the same by and in an indenture of even date herewith, and to be executed immediately after these presents, and to be made between the same parties as are parties to these presents: PROVIDED ALWAYS, &c. [*Clause as to appointment of trustees, ante*, p. 552].

IN WITNESS, &c.

VII. Assignment of Portion on Marriage.

Habendum.

In trust for wife till marriage and afterwards upon trusts, &c., declared by indenture of even date.

VIII. *SETTLEMENT ON MARRIAGE of a* PORTION *belonging to the intended* WIFE *which has been assigned to the Trustees by an Indenture of even date (see last Precedent), and of several* POLICIES OF ASSURANCE *on the* LIFE *of the* HUSBAND *which have been effected by him in his own name. First* LIFE INTEREST *is given to* WIFE, *with power for Trustees to pay Income to the Husband or to Wife's Bankers. Second* LIFE INTEREST *to* HUSBAND *terminable on Bankruptcy, &c.* TRUSTS *for* ISSUE (*Special*). PROVISIONS *for keeping up the* POLICIES. POWER *for Husband to* REDEEM POLICIES.

THIS INDENTURE (*e*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*in-*

Parties.

(*e*) Stamp, 5*s.* per 100*l.*, or part of 100*l.*, of the value of the portion, and of the amount assured by the policies; also 10*s.* in respect of the covenant to settle after-acquired property.

VIII. Of Portion belonging to Wife.

tended wife], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS [*recite intended marriage, ante*, p. 544; *and title of wife to portion, and agreement to settle the same, ante*, p. 572]; AND WHEREAS, in part performance of the said agreement, by an indenture bearing even date herewith, but executed before the execution of, and expressed to be made between the same parties as are parties to these presents, the said [*wife*], with the approbation of the said [*husband*], has assigned the said portion or sum of £——, and the interest now due and to become due thereon, to hold the same unto the said [*trustees*], their executors, administrators, and assigns, In trust for the said wife until the said intended marriage should take place, and thereafter upon such trusts, and with and subject to such powers and provisions, as should be declared and contained concerning the same by an indenture of even date therewith therein referred to, being these presents; AND WHEREAS the said [*husband*] is absolutely entitled to the several policies on his life hereinafter mentioned, and, upon the treaty for the said intended marriage, it was agreed that the same policies should be respectively assigned to the said [*trustees*] in manner hereinafter appearing, upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same; AND WHEREAS, &c. [*recite agreement to settle wife's after-acquired property, ante*, p. 544]: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement in this behalf, and in consideration of the said intended marriage, it is hereby agreed and declared by and between the parties hereto, that the said [*trustees*], and the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall, from and after the said intended marriage, stand possessed of the said portion or sum of £—— and interest thereon, as and when the same shall be received by them or him, UPON TRUST to invest the said portion or sum of £——, or so much thereof as shall for the time being have been received by them or him in their names or name, &c. [*Investment clause, ut ante*, pp. 545, 554, 558, *or* 562; *power to vary investments, ante*, p. 545]; AND shall pay the interest or income of the said portion which shall be received by the said trustees or trustee, and of the investments for the

Recitals:

of marriage, &c.;

of assignment of portion to trustees;

of husband's title to policies.

Testatum.

Declaration of trusts of portion;

trust for investment;

trust of income for wife for life.

VIII. Of Portion belonging to Wife.

time being representing the same (which portion or sum and investments are hereinafter called "the said trust fund") unto the said [*wife*] during her life, for her separate use, but so that she shall have no power to anticipate the same; PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee may pay any annual income to which the said [*wife*] shall at any time during the now intended coverture be entitled under the trusts of these presents, upon the request of the said [*wife*], to be made by any writing or writings under her hand [either to the said [*husband*] or] into any such banking-house or to such bankers as the said [*wife*] shall at any time or times during the said intended coverture nominate in that behalf, to be placed to her account at such banking-house or with such bankers, and to continue to make such payments accordingly until she shall by any such writing as aforesaid otherwise direct: AND it is hereby agreed and declared that from and after the death of the said [*wife*], in case the said husband shall then be living, and shall not have done, committed, suffered or concurred in any act, default, matter or thing whereby the income of the said trust fund, if absolutely belonging to him, would wholly or partially vest in, or become payable to, or be charged in favour of some other person or persons, the said trustees or trustee shall pay the annual income of the said trust fund to the said [*husband*] during his life or until he shall do, commit, suffer or concur in some such act, default, matter, or thing, whereby the income of the said trust fund, if absolutely belonging to him would, wholly or partially, vest in, or become payable to or be charged in favour of some other person or persons (*g*):

Power for trustees to pay income to husband or wife's bankers (*f*);

Trust for husband for life determinable on bankruptcy, &c.

(*f*) See as to the insertion of such a power, *ante*, p. 296.

(*g*) It may be advisable here to add the following proviso, so as to enable the husband to charge, or release his life interest in favour of a child:—

"PROVIDED ALWAYS, that nothing herein contained shall prevent the said [*husband*] from charging or otherwise disposing of the said income or any part thereof during his life or any less period [with the consent in writing of the said trustees or trustee] in favour of any child of the said intended marriage who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry within six calendar months after the date of such charge or disposition."

Proviso that husband may charge, &c., income in favour of a child.

VIII. Of Portion belonging to Wife.

Discretionary trust of income after bankruptcy, &c., of husband.

PROVIDED ALWAYS, and it is hereby agreed and declared that, in the event of the failure or determination during the life of the said [*husband*] of the trust of income hereinbefore declared in his favour, then the said trustees or trustee may, in the exercise of their or his absolute discretion, pay or apply the income of the said trust fund or any part thereof to or for the personal support and maintenance or otherwise for the benefit of the said [*husband*] and the children or child or other issue for the time being of the said intended marriage [*or*, of the said [*husband*] and his wife and issue, if any in existence], and the persons or person for the time being interested in the said trust fund under the ulterior trusts hereinafter declared, or such one or more exclusively of the others or other of them, and in such shares and manner as the said trustees or trustee shall in their or his absolute discretion think fit; And that, in the event of such failure or determination as aforesaid, and subject to such discretionary power, the said trustees or trustee shall during the remainder of the life of the said husband, hold the income of the said trust fund upon the trusts upon which the same would for the time being be held if the said [*husband*] were then actually dead: AND it is hereby agreed and declared that from and after the death of the said husband, the said trustees or trustee shall stand possessed of or interested in the said trust fund and the income thereof IN TRUST, &c., [*for issue of marriage as husband and wife shall jointly appoint, remainder as survivor shall appoint, ante*, p. 546]; PROVIDED ALWAYS and it is hereby agreed, that if the said [*husband*] shall survive the said [*wife*], and if the trust hereinbefore declared in his power shall fail or determine in his life-time, the several powers hereinbefore given to him jointly with the said [*wife*] and, after her death, alone, of making appointments in favour of the issue of the said intended marriage, shall continue to be exercisable notwithstanding such failure or determination; AND in default of such appointment and so far as no such appointment shall extend, then if there shall be more

Usual trusts in favour of children and issue.

Power for husband to make appointments notwithstanding bankruptcy, &c. (*h*).

(*h*) Where, as in the present case, a discretionary trust is inserted for application of income on the husband's bankruptcy, &c., it seems generally advisable that the power of appointment should continue to be exerciseable by him; otherwise it may be better to negative the exercise of the power after bankruptcy, as in Precedent XII.: see *post*, p. 604. In any case the intention should be expressed. See further *ante*, p. 160.

VIII. Of Portion belonging to Wife.

than one child who being sons or a son shall attain the age of twenty-one, or being daughters or a daughter shall attain that age or marry, then the said trustees or trustee shall stand possessed of the said trust fund and the income thereof, IN TRUST for all or both such children in equal shares; but if there shall be only one such child, then, as to one moiety of the said trust fund IN TRUST for such only child, and as to the other moiety, UPON THE SAME TRUSTS as are hereinafter declared and contained concerning the entirety of the said trust fund in the event of there being no such child as aforesaid: PROVIDED ALWAYS, &c., [*Hotchpot clause; power of advancement; ultimate trusts in default of issue in favour of wife, ante*, pp. 547 *et seq.*; *covenant to settle after-acquired property of wife, ante*, p. 549]: AND THIS INDENTURE ALSO WITNESSETH that, in pursuance of the said agreement in this behalf, and for the consideration aforesaid, the said [*husband*], with the approbation of the said [*wife*], hereby assigns, and as beneficial owner conveys unto the said [*trustees*], their executors or administrators ALL THOSE —— several policies of assurance, the particulars whereof are specified in the schedule hereunder written, And all monies thereby assured respectively or to be recovered or received under or by virtue of the same respective policies by way of bonus or otherwise To HOLD the same policies, monies and premises hereby assigned unto the said [*trustees*], their executors, administrators and assigns, UPON TRUST for the said [*husband*] until the said intended marriage shall take place, And thereafter UPON THE TRUSTS, and with and subject to the powers and provisions herein declared and contained of and concerning the said trust fund hereby settled, or as near thereto as the deaths of parties and other circumstances will admit, save and except that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then, subject to the trusts, powers and provisions herein declared and contained concerning the said trust fund, or by law vested in the said trustees or trustee, the said trustees or trustee shall stand possessed of the said policy monies and the investments and income thereof IN TRUST for the said [*husband*], his executors, administrators and assigns: [*covenants by husband for keeping up the policies, and proviso as to bonuses ut ante*, p. 559, *mutatis mutandis*:]

Further *testatum*.

Assignment of policies (*i*).

Habendum.

Declaration of trusts by reference.

(*i*) Notice of this assignment should be given to the society.

VIII. Of Portion belonging to Wife.

Power to apply income or capital of trust funds in keeping up policies.

PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee may in their or his uncontrolled discretion, from time to time apply any part of the income of the trust premises hereby settled or covenanted or agreed to be settled, or if that shall be insufficient, then any part of the capital of any of the same trust premises in or towards payment of the annual premiums or other sums, if any, necessary for keeping on foot or restoring the said respective policies of assurance, or any of them, or any such substituted policy as aforesaid, or for effecting any such substituted policy, or to borrow the amount required for any such purpose at interest on the security of the said policies or any of them, and the other trust premises hereby settled or covenanted or agreed to be settled or any part thereof: [*Proviso for indemnity of trustees ut ante, p.* 561, *mutatis mutandis*:]

Power for husband to pay a gross sum in lieu of policies:

PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said husband shall at any time during his life pay to the said trustees or trustee the sum of £——, then, from and after such payment, the said trustees or trustee shall stand possessed of the said policies hereby assigned, and all such substituted policies, if any, as aforesaid, and all monies to be received under or by virtue of the same policies or any of them by way of bonus or otherwise,

Trusts of sum paid by husband:

IN TRUST for the said [*husband*], his executors, administrators and assigns; AND that the said trustees or trustee shall stand possessed of the said sum of £——, as and when the same shall be received by them or him,

UPON TRUST to invest the same in like manner as is hereinbefore directed with regard to the investment of the said trust fund hereby settled, with the like power of varying investments:

for husband for life;

And shall pay the income of the said sum of £——, and of the investments for the time being representing the same, unto the said [*husband*] during his life;

for wife surviving for her life;

And from and after the death of the said [*husband*] shall pay the income thereof to the said [*wife*], if she shall survive him, but so that she shall not during the said intended coverture have power to dispose of or charge such reversionary life interest by way of anticipation;

remainder for children upon trusts by reference to settled funds:

AND from and after the death of the survivor of them the said [*husband*] and [*wife*], shall stand possessed of the said sum of £—— and the investments for the time being representing the same and the income thereof upon the like trusts, and with and subject to the like powers and provisions in favour or for the benefit of the children or remoter issue of the said intended marriage or any of them, as are hereinbefore declared and contained con-

VIII. Of Portion belonging to Wife.

cerning the said trust fund hereby settled, or as near thereto as the deaths of parties and other circumstances will admit; AND it is hereby agreed and declared that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then subject to the trusts and powers hereinbefore declared and contained or referred to, or by law vested in the said trustees or trustee, the said trustees or trustee shall stand possessed of the said sum of £—— and the investments for the time being representing the same and the income thereof IN TRUST for the said [*husband*] absolutely: PROVIDED ALWAYS, and it is hereby agreed and declared, that if any of the trust funds hereby settled or covenanted or agreed to be settled shall have become so blended as to make it doubtful which part or parts thereof shall represent each original fund or any part thereof, the said trustees or trustee shall have power to apportion and divide the same for the purposes of the trusts of these presents as fully and effectually as the same might be done by a Court of competent jurisdiction in an action or other proceeding duly instituted for the purpose [*Power to appoint new trustees; trustee clauses, ante, p.* 552].

in default of children, for husband absolutely.

Power for trustees to apportion blended trust funds.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

IX. *SETTLEMENT on* MARRIAGE, *of* STOCK *in the Funds and a* BOND DEBT, *belonging to the intended Husband, and a* SHARE *in a* RESIDUE *under a* WILL, *belonging to the intended Wife. Usual Limitations for the Benefit of the respective Settlors, and the Objects of the intended or any* FUTURE MARRIAGE, *with the* ULTIMATE TRUSTS *of the respective Properties for the Benefit of the* RESPECTIVE SETTLORS. (*A concise form.*)

THIS INDENTURE (*j*), made the —— day of ——, BETWEEN [*intended husband*], of, &c., of the first part; Parties.

(*j*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of the amounts brought into settlement.

IX. Of Personalty, Part belonging to Husband, and Part to Wife.

[*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS, in contemplation of the marriage now intended between the said [*husband*] and [*wife*], the said [*husband*] has transferred the sum of £——, $2\frac{3}{4}$ per cent. Consolidated Stock into the names of the said [*trustees*]; AND WHEREAS the sum of £——, with interest, is secured to the said [*husband*] by the bond of [*obligor*], dated the —— day of ——, 18—; AND WHEREAS, under the will of [*testator*] late of, &c., deceased, dated, &c., and proved, &c., the said [*wife*] is entitled to one-fourth part of the residue of the produce of the real and personal estate of the said [*testator*], subject to the life estate of his widow therein, and subject to increase in manner by the said will provided: NOW THIS INDENTURE WITNESSETH, that in consideration of the said intended marriage, the said [*husband*] hereby assigns, and as settlor conveys unto the said [*trustees*], ALL the said bond debt of £——, And all future interest thereon, And the said bond and all benefit thereof (*k*); AND the said [*wife*] hereby assigns and as settlor conveys unto the said [*trustees*], ALL her said fourth part of the residue of the said real and personal estate of the said [*testator*]; And all other her share and shares and interest, present or future, under the said will: AND IT IS HEREBY AGREED that the said [*trustees*] and the survivors and survivor of them, and the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall be possessed of the said sum of stock so transferred as aforesaid, and of the trust-premises hereby assigned by the said [*husband*], UPON TRUST, until the said marriage, for the said [*husband*], and thereafter UPON TRUST, to pay the income thereof unto (*l*) the said [*husband*] during his life; AND, after his decease, to pay such income unto the said [*wife*] during her life for her separate use without power of anticipation; And after the decease of the survivor of the said [*husband*] and the said [*wife*], to transfer the capital thereof unto or for the benefit of such child or children or other issue of the said intended marriage

Recitals:
of transfer of stock by husband;
of bond;
of wife's title to share of residue.

Testatum.

Assignment of bond debt.

Assignment of share of residue.

Trusts:
as to stock and bond debt, for husband for life; then for widow for life; then for children as he shall appoint;

(*k*) Notice of this assignment should be given to the obligor.

(*l*) Sometimes the income of the husband's property is protected from his creditors by being given immediately to the wife for her separate and inalienable use.

[*husband*] and in such proportions and manner as he shall by deed or will appoint. AND, subject thereto, to transfer the same unto such child or children of the said intended marriage [*husband*] as shall attain the age of twenty-one years, or [being a daughter or daughters] marry, if more than one, in equal shares. BUT if there be no such child of the said intended marriage, then, immediately after the decease of the said [*wife*], to transfer the same unto the said [*husband*], his executors, administrators or assigns: AND IT IS HEREBY FURTHER AGREED that the said trustees or trustee shall stand possessed of the share or shares and premises hereby assigned by the said [*wife*] UPON TRUST until the said marriage for the said [*wife*]; AND thereafter upon trust to pay the income thereof unto the said [*wife*] during her life, for her separate use, without power of anticipation during any coverture; AND, after her decease, to pay such income unto the said [*husband*] during his life; AND, after the decease of the survivor of them the said [*husband*] and [*wife*], shall stand possessed of the capital and income thereof IN TRUST for such child or children or other issue of the said [*wife*], and in such proportions and manner as she shall by deed or will appoint; AND, subject thereto, IN TRUST for such child or children of the said intended marriage as shall attain the age of twenty-one years, or [being a daughter or daughters], marry, if more than one, in equal shares; WITH POWER to raise and apply for the advancement in life or otherwise for the benefit of any child or children any part of his, her, or their expectant or presumptive share or shares not exceeding one half thereof; BUT if there be no such child of the said intended marriage, then, if the said [*wife*] should survive the said [*husband*], the said trustees or trustee shall stand possessed of the same share or shares hereby assigned by the said [*wife*], IN TRUST for her absolutely, for her separate use but without power of anticipation; and if she should not survive him, then IN TRUST for such person or persons, and in such manner as she shall by will appoint; and, subject thereto, for such person or persons, and in such manner as if the same were her personal estate and she had died intestate, without ever having been married [*Power to apportion blended funds, ante*, p. 579; *Trustee clauses, ante*, p. 552].

IN WITNESS, &c.

IX. Of Personalty, Part belonging to Husband, and Part to Wife.

and in default of appointment equally at twenty-one or marriage;

if no children, to his executors, administrators, or assigns;

as to wife's property, for her separate use for life, then for children as she shall appoint and in default of appointment, equally.

Trusts in default of children in favour of wife.

X. *SETTLEMENT on* MARRIAGE *of a* GROSS SUM COVENANTED *by the* HUSBAND *to be* PAID *by him on the* MARRIAGE, *and of a* REVERSIONARY INTEREST *of the* WIFE *derived under the* MARRIAGE SETTLEMENT *of her* PARENTS, *and on* APPOINTMENT. PROVISO *that the* SUM *secured by Husband's Covenant shall* NOT *be* CALLED *in during his lifetime.* COVENANTS *by* WIFE'S FATHER *to pay an* ANNUITY, *during joint lives of himself and his Wife, and to make up Wife's* REVERSIONARY INTEREST *to a certain* AMOUNT. POWER *to* INVEST *trust moneys in* PURCHASE *of* LAND; POWER *to* APPORTION *blended Funds;* POWER *for surviving* HUSBAND *or* WIFE *to* WITHDRAW *trust funds from settlement on a* FUTURE MARRIAGE; POWER *for* HUSBAND *and* WIFE *respectively to appoint* HIS *and* HER OWN TRUSTEES.

Parties.

THIS INDENTURE (*m*), made the —— day of ——, 18—, BETWEEN [*intended husband*] of, &c., of the first part; [*intended wife*] of, &c., of the second part; [*wife's father*] of, &c., of the third part; And [*trustee No.* 1] of, &c., [*trustee No.* 2] of, &c., [*trustee No.* 3] of, &c., and [*trustee No.* 4] of, &c., of the fourth part: WHEREAS [*recite intended marriage, ante*, p. 544]: AND WHEREAS upon the treaty for the said marriage it was agreed that the said husband should enter into the covenant on his part hereinafter contained for payment to the said [*trustees*] of the sum of £——, in manner hereinafter appearing, to be settled upon the trusts and with and subject to the powers and declarations hereinafter declared and contained concerning the same; AND WHEREAS under an indenture dated, &c., and made between [*parties*] (being the settlement made on the marriage of the said [*wife's father*] and [*wife's mother*]), and a deed poll dated, &c., under the hands and seals of the said [*wife's father*] and [*wife's mother*], the said [*wife*] is entitled to one equal ——th part or share of or in the trust funds and property subject to the trusts of the said settlement, subject to the prior life interests of the said [*wife's father*]

Recitals:
of intended marriage;
of agreement that husband shall covenant for payment of sum;
of wife's title to reversionary interest;

(*m*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of the amount of the sum covenanted to be paid by the husband, and of the value of the wife's reversionary interest; also 10*s.* in respect of the covenant for payment of the annuity, 10*s.* in respect of the covenant to make up the value of the reversionary interest, and 10*s.* in respect of the covenant to settle the wife's after-acquired property, if inserted.

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

and [*wife's mother*] in the said trust funds and property under the same settlement; And upon the treaty for the said marriage it was agreed that the said part or share of the said [*wife*] and all other her share or interest under or by virtue of the said settlement and appointment or either of them should be assigned to the said [*trustees*] to be held, as and when the same shall fall into possession, upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same; AND WHEREAS upon the treaty for the said intended marriage it was further agreed that the said [*wife's father*] should enter into the covenant on his part hereinafter contained for payment to the said [*trustees*] of the annual sum hereinafter mentioned, to be received and applied upon the trusts and in manner hereinafter appearing, and also into the covenant hereinafter contained for making up the said reversionary share or interest of the said [*wife*] to the sum of £——; AND WHEREAS, &c., [*agreement for settlement of wife's after-acquired property, ante*, p. 544]: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement in this behalf, and in consideration of the said intended marriage, the said [*husband*], with the approbation of the said [*wife*] (hereby testified), hereby covenants with the said [*trustees*] that if the said intended marriage shall take place, he the said [*husband*], his executors or administrators, will, within —— calendar months thereafter, pay to the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called the said trustees or trustee), the sum of £——, with interest for the same at the rate of —— per cent. per annum from the day of such marriage; and also, if the said sum of £——, or any part thereof, shall not be paid within such —— calendar months, will pay to the said trustees or trustee interest for the same, or so much thereof as shall for the time being remain unpaid, at the rate aforesaid by equal half yearly payments, the first of such payments to be made at the end of six calendar months from the day of the said marriage: PROVIDED ALWAYS that during the life of the said [*husband*] the said trustees or trustee shall not compel or require performance of the said covenant for payment of the said sum of £——, but it shall be optional for the said husband to pay the same sum or any part thereof at such time or times as he shall in his discretion think fit;

and of agreement to settle the same;

of agreement that wife's father should enter into covenants for payment of annuity, &c.;

of agreement to settle wife's after-acquired property.

Testatum.

Covenant by husband for payment of gross sum with interest.

Proviso that trustees may forbear to compel payment of sum.

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

and that after the death of the said husband it shall be lawful for the said trustees or trustee in their absolute discretion either to call in and require payment of the said sum of £——, or of so much thereof as shall for the time being remain unpaid, or to leave the same on the security of the covenant for payment thereof hereinbefore contained, or on such other security as may be arranged between the said trustees or trustee and the executors or administrators of the said [*husband*], for so long as the said trustees or trustee shall think proper; And no trustee or trustee for the time being of these presents shall be responsible for any loss occasioned by their omission to call in or compel or require payment of the said sum of £——, or any part thereof, either during the life of the said [*husband*] or after his death: And it is hereby agreed and declared that the said trustees or trustee shall stand possessed of the said sum of £——, hereinbefore covenanted to be paid to them (hereinafter called the "husband's trust fund") and every part thereof, as and when the same shall be received by them or him, and the income thereof: Upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same: AND THIS INDENTURE ALSO WITNESSETH that, in pursuance of the said agreement in this behalf, and for the consideration aforesaid, the said [*wife*], with the approbation of the said [*husband*], hereby assigns, and as settlor conveys, unto the said [*trustees*], their executors, administrators and assigns: All that the said equal part or share to which the said [*wife*] is, and all other, if any, the share or interest to which she may in any event become entitled, under or by virtue of the said indenture of settlement and deed of appointment, or either of them, of or in the trust funds and property comprised in, or which now or at any future time may become subject to the trusts of the said indenture of settlement, expectant on the decease of the said [*wife's father*] and [*wife's mother*], and subject to their respective life interests therein as hereinbefore mentioned: To hold the premises hereby assigned (hereinafter called the "wife's trust fund") unto the said [*trustees*], their executors, administrators and assigns, subject to the life interests therein of the said [*wife's father*] and [*wife's mother*] respectively: In trust for the said [*wife*] until the said intended marriage shall take place, And thereafter Upon the trusts, and with and subject to the powers and

Agreement that sum covenanted to be paid by husband shall be held on trusts to be declared.

Second *testatum*.

Assignment by wife of her reversionary interest.

Habendum.

On trusts hereinafter declared.

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

provisions hereinafter declared concerning the same : AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall, from and after the said intended marriage, stand possessed of the said husband's trust fund and wife's trust fund respectively, as and when the same respectively, or any part thereof respectively, shall be paid to them or him, or have fallen into possession respectively, and either permit the same respectively to remain in their actual state of investment, or shall, with the consent in writing of the said [*husband*] and [*wife*], during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor, at the discretion of them the said trustees or trustee, invest the said trust funds respectively, or such part or parts thereof respectively as shall from time to time be received by them or him, in their or his names or name, &c. [*Continue investment clause, ut ante*, pp. 545, 554, 558, *or* 562 ; *power to vary investments, ante*, p. 545] ; AND shall, during the joint lives of the said [*husband*] and [*wife*], pay the income arising from the said husband's trust fund, or of so much as shall for the time being have been received by the said trustees or trustee and the investments representing the same, unto the said [*husband*] ; and from and after the death of such one of them the said [*husband*] and [*wife*] as shall first die, unto the survivor of them during his or her life ; AND shall, during the joint lives of the said [*husband*] and [*wife*], pay the income arising from the said wife's trust fund, when and so soon as the same shall have fallen into possession, unto the said [*wife*] ; And from and after, &c. [*ut supra*] ; And from and after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of both the said husband's trust fund and wife's trust fund, if and so soon as the same respectively, or any part thereof respectively, shall have been paid or fallen into possession respectively, and the income of the same trust funds respectively, UPON TRUST, &c. [*for issue as husband and wife shall jointly appoint, and in default of such appointment as survivor shall appoint, and in default of any appointment for children equally at* 21 *or marriage ; hotchpot clause ; power of advancement, ante*, p. 546 *et seq.*] ; AND IT IS HEREBY AGREED AND DECLARED that if there shall be no child of the said intended marriage who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then subject to the trusts and powers hereinbefore declared and contained, the said trustees or trustee shall stand possessed of the said husband's trust

Declaration of trusts, &c., of both funds :

for investment ;

as to income of husband's trust fund, during joint lives of himself and wife, to him, remainder to survivor for life ;

as to income of wife's trust fund, during joint lives, to her, remainder to survivor for life ;

usual trusts of both funds for issue of marriage.

Trusts of capital in default of issue.

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

fund and wife's trust fund respectively if and so soon as the same shall have been paid or fallen into possession, and the investments representing the same respectively, and the income thereof, or so much thereof respectively as shall not have been paid or applied under any trust or power herein declared or contained, or under any statute, upon the trusts hereinafter declared and contained concerning the same trust funds respectively, that is to say, As to the said husband's trust fund and the investments representing the same, and the income thereof, In trust for the said [*husband*] absolutely;

As to husband's trust fund, for him absolutely.

As to wife's trust fund, on usual trusts in her favour.

And as to the said wife's trust fund [*ultimate trusts in favour of wife, ante, p. 548, omitting restraint on anticipation*];

General proviso in restraint of anticipation.

Provided always and it is hereby agreed and declared, that the said [*wife*] shall not have power during the said intended coverture to dispose of or charge any estate or interest whatever, whether in possession, reversion, remainder, or expectancy, hereby given to her in any trust property hereby settled or agreed to be settled by way of anticipation;

Power to lay out trust monies in purchase of land (*m*).

Provided always and it is hereby agreed and declared that it shall be lawful for the said trustees or trustee, with such consents or at such discretion as aforesaid, at any time or times to sell and dispose of any stocks, funds, [shares,] and securities whereon the said trust monies shall for the time being be invested; And to invest the money to arise from the sale or disposition thereof in the purchase of any freehold, copyhold, or customary or leasehold messuages, lands, tenements, or hereditaments, in England and Wales (so that the leaseholds be held for an absolute term, of which not less than [*sixty*] years shall be then unexpired, or by lease containing a covenant to renew for such term at least), with power to purchase, subject to any special stipulations, and to complete or accept any contract or title, though not strictly enforceable or marketable, and to waive any objections or requisitions: And to cause the same when so purchased to be conveyed and assured unto and to the use of the said trustees or trustee, their or his heirs, executors, administrators, and assigns respectively, according to the nature and quality thereof respectively, to be held by them or him Upon trust, with the consent in writing of the said [*husband*] and [*wife*], or of the survivor of them, and after the death of such survivor, at the discretion of the said trustees or trustee, to sell

Trust for resale.

(*m*) As to powers to invest in land, see Vaizey on Settlements, Vol. I., pp. 494 *et seq.*

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

all or any of the same messuages, lands, tenements, and hereditaments; And, with such consent or at such discretion as aforesaid, to lay out the money so to be received in the names or name of the said trustees or trustee in or upon any such stocks or funds, [shares,] or securities as aforesaid, or in the purchase of any such hereditaments as are hereinbefore authorised to be purchased; With power to vary and transpose the same investments, or any of them, as often as shall be thought expedient. And it is hereby agreed and declared that the said trustees or trustee shall hold the said messuages, lands, tenements, and hereditaments so to be purchased, and the rents, issues, and profits thereof, in the meantime until the sale thereof, and the money to arise from such sale, and the stocks, funds, [shares,] or securities whereon the same shall be invested, and the annual produce and income thereof, upon, with, and subject to such of the several trusts, powers, provisoes, and directions herein expressed and contained concerning the said trust monies, stocks, funds, [shares,] and securities out of the proceeds or produce whereof such purchase or purchases shall be made as aforesaid, and the income thereof, as shall then be subsisting and capable of taking effect: Provided always that in the meantime, and until all the said purchased lands and premises shall have been sold, the said trustees or trustee shall have power to receive the rents and profits thereof, and to manage, either personally or by salaried agents, bailiffs, or deputies, the same premises or the unsold parts thereof; And to demise the same lands and premises or any part thereof, for any term not exceeding twenty-one years, to take effect in possession or within six calendar months of the date of the lease of the premises so demised, at the best rent that can be obtained without taking a premium, subject to a power of re-entry if the rent shall be in arrear for twenty-one days; And it is hereby agreed, that in the meantime and until all the said purchased lands and premises shall have been sold, the rents and profits thereof shall (after payment thereout of costs and expenses of fire insurance, repairs, management, ground rents, and other outgoings) be paid and applied to the person or persons, upon the trusts, and in the manner, to whom, upon, and in which, the income arising from the proceeds of sale of such lands and premises would have been payable or applicable by virtue of the trusts hereinbefore contained if such sale had been made; Provided always

Trusts of purchased lands.

Power of management.

Power to lease.

Trusts of rents of lands leased.

Proviso for

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

that if any messuages, lands, or property to be purchased as aforesaid shall be held under any lease or leases, the said trustees or trustee shall be entitled to be fully indemnified out of the trust premises for the time being subject to the trusts of these presents, and the rents and income thereof from all liability in respect of all rents, covenants, and conditions reserved by or contained in such lease or leases;

indemnity of trustees in respect of leaseholds.

AND THIS INDENTURE ALSO WITNESSETH, that in pursuance of the said agreement in this behalf, and for the consideration aforesaid, the said [*wife's father*] hereby covenants with the said [*trustees*] that, if the said intended marriage shall take place, he, the said [*wife's father*], his heirs, executors or administrators, will pay to the said trustees or trustee during the joint lives of the said [*wife's husband*] and [*wife's mother*], and the life of the survivor, if and so long as the said [*husband*] or the said [*wife*], or any issue of the marriage, shall be living, the yearly sum of £——, commencing from the day of the said marriage and payable by equal half-yearly payments on the —— day of ——, and —— day of —— in every year,

Third *testatum.*

Covenant by wife's father for payment of annuity.

but to be deemed as accruing from day to day: AND it is hereby agreed and declared that the said trustees or trustee shall stand possessed of the said yearly sum of £——, payable under the covenant of the said [*wife's father*] upon trust from time to time (*n*) to pay and apply the same to the person or persons for the purposes and in manner for and in which the income of the wife's trust fund would, if the same had fallen into possession under or by virtue of the trusts, powers and provisions herein contained, be for the time being payable or applicable: AND the said [*wife's father*] hereby further covenants with the said [*trustees*] that, if the said intended marriage shall take place, and if at the death of the survivor of him the said [*wife's father*] and [*wife's mother*] his wife, the part or share appointed to or in favour of the said [*wife*], or to which she may become entitled in default of appointment, of or in the said trust funds and property comprised in or subject to the trusts of the hereinbefore mentioned indenture of settlement, shall not be of the value in the whole of £——, then the executors or administrators of the said [*wife's father*] shall within —— calendar months of the death of the sur-

Trusts of annuity.

Covenant by wife's father to make up the wife's reversionary interest to a certain amount.

(*n*) Or, if so intended, insert here :—

"pay the same to the said [*husband*] during his life and subject thereto pay and apply the same, &c.," *as in the text.*

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

vivor of the said [*wife's father*] and [*wife's mother*] pay to the said trustees or trustee such a sum of money as shall, with the amount in value at the time of payment of the said part or share, make up the full sum of £—— with interest for the same from the death of such survivor at the rate of —— per cent. per annum: And it is hereby agreed and declared that the said trustees or trustee shall hold and apply any principal sum and interest payable under the covenant lastly hereinbefore contained upon the like trusts and with and subject to the like powers and provisions as are herein declared and contained concerning the wife's trust fund, and the investments thereof, and the income thereof respectively: [*Covenant for settlement of wife's after-acquired property, ante, p.* 549]. PROVIDED ALWAYS, and it is hereby agreed and declared that, notwithstanding the proviso against anticipation by the said wife of any interest hereby given to her, it shall be lawful for the said trustees or trustee if they shall, in their or his discretion, think it proper or expedient in the interests of the said [*wife*] so to do, at any time or times, upon the request in writing of the said [*wife*] during her life or pursuant to her request contained in her will or any codicil thereto, and whether or not there may be issue living of the said intended marriage at the time of any such request to raise, by sale or conversion of any of the investments for the time being representing the said wife's trust fund when and so soon as the same shall have fallen into possession, or previously thereto, by mortgage of, or charge upon the same fund, and of the said annuity and sum respectively covenanted to be paid by the said [*wife's father*], and hereby made subject to the trusts, powers and provisions of the same fund, or any of such trust premises or any part thereof respectively, at interest after such rate as may be arranged, or by such other ways and means as the said trustees or trustee shall think fit, any sum or sums of money not exceeding in the whole the sum of £——, and to pay the sum so raised to the said [*wife*] for her absolute use and benefit, or apply the same for her benefit in such manner as the said trustees or trustee shall think fit: PROVIDED ALWAYS, and it is hereby further agreed and declared, that if all or any of the trust funds hereinbefore mentioned and intended to be hereby brought into settlement or any parts thereof, shall become so blended as to make it doubtful which part or parts thereof shall represent each original fund, it shall be lawful for the said trustees or trustee

Trusts of sum so to be paid.

Power for trustees to raise out of the wife's trust fund a sum not exceeding £—— for her benefit;

Power for trustees to apportion blended trust funds, and to make appropriations.

X. Of Sum Secured by Husband's Covenant, and Reversionary Interest of Wife under Prior Settlement, &c.

to apportion and divide the same for the purposes of the trusts of these presents; And also upon any partial or upon the final distribution of the said trust funds or any of them, to appropriate any sums of money, stocks, funds, securities or other property for the time being subject to the trusts of these presents as the said trustees or trustee shall in their or his absolute and uncontrolled discretion think proper for that purpose to answer any shares or interests, or share or interest arising under or by virtue of these presents; and every such apportionment division or appropriation shall be as effectual and binding upon all persons interested, as if made by a Court of competent jurisdiction in an action or other proceeding duly instituted for that purpose: PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the survivor of them the said [*husband*] and [*wife*], at any time or times after the death of the other of them, either in contemplation of or after any future marriage of such survivor, by any deed or deeds with or without power of revocation and new appointment, or by will or codicil to appoint in favour of any wife or husband with whom such survivor may intermarry after the death of the other of them, such shares and interests of and in the respective trust funds and property hereby settled on the part of such survivor, including in the case of the said [*wife*], such shares and interests of and in any property which may become subject to the trusts of these presents under or by virtue of the agreement for settlement of his other or after-acquired property hereinbefore contained, as follows, that is to say, &c. [*continue power to withdraw funds from settlement in proportion to number of children of the intended marriage, &c., ut ante*, p. 550, *mutatis mutandis*].

Power for surviving husband or wife to withdraw funds from settlement on a future marriage.

Power to appoint new trustees where each party names his and her own trustee.

PROVIDED ALWAYS, and it is hereby agreed and declared, that the statutory power of appointing new trustees or a new trustee of these presents in the place of the said [*trustee No.* 1] and [*trustee No.* 2], or either of them, or any future trustees or trustee to be appointed as next hereinafter is mentioned, shall be vested in and exerciseable by the said [*husband*] during his life; and that the statutory power of appointing new trustees or a new trustee in the place of [*trustee No.* 3] and [*trustee No.* 4], or either of them, or any future trustees or trustee to be appointed as next hereinafter is mentioned, shall be vested in and exerciseable by the said [*wife*] during her life; [*Trustee clauses, ante*, p. 552].

IN WITNESS, &c.

XI. *SETTLEMENT on* MARRIAGE *of a* SHARE *of the* RESIDUARY ESTATE *of a Deceased Testator belonging to the* WIFE, *and of several* POLICIES *of* ASSURANCE *on the* LIFE *of the* HUSBAND *effected in the names of the* TRUSTEES. COVENANT *by the* HUSBAND'S FATHER *for* PAYMENT *to the Trustees six months after the Marriage of a* SUM *of Money with* INTEREST *till Payment.* POWER *for Trustees to* FORBEAR *requiring Payment.* COVENANTS *by* WIFE'S FATHER *to pay an* ANNUITY *during his Life, and also to* LEAVE *to her by his* WILL *a* SHARE *of his Estate equal to that of any other child.* POWER *for* TRUSTEES *to invest Trust Moneys in* PURCHASE *of a* RESIDENCE.

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*intended husband*] of, &c., of the first part; [*intended wife*] of, &c., of the second part; [*husband's father*] of, &c., of the third part; [*wife's father*] of, &c., of the fourth part; and [*trustee*], of, &c., and [*trustee*], of, &c., the fifth part: WHEREAS [*recite intended marriage, ante*, p. 544]; AND WHEREAS the said [*wife*] is now under the will of her uncle [*testator*], of, &c., dated, &c., and proved, &c., absolutely entitled in possession, as one of the children of her father the said [*wife's father*] by her late mother [*wife's mother*] deceased, to one equal ——th part or share of the residuary personal estate of the said [*testator*], which so far as it has now been realised or ascertained consists of or is represented by the several sums of money, stocks, funds, shares and securities specified in the schedule hereunder written, now standing in the names of or otherwise vested in or under the legal control of [*executors*], the executors of the said will, and the said [*wife*] may, in the event of the death of any of the other children of the said [*wife's father*] by the said [*wife's mother*] deceased, being sons or a son under the age of twenty-one years, or, being

Parties:

Recitals: of intended marriage; of title of wife to share of residuary estate under a will;

(*o*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of the value of the wife's share, and of the amounts assured by the policies, and also of the amount of the gross sum covenanted to be paid by the husband's father; 10*s.* in respect of each of the covenants by the wife's father; and 10*s.* in respect of the covenant to settle the wife's after-acquired property, if inserted.

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

daughters or a daughter under that age and without having been married, become entitled to a further share or further shares in the said residuary personal estate: AND WHEREAS, upon the treaty for the said intended marriage, it was agreed that all the said ——th part or share to which the said [*wife*] is now or may hereafter become entitled as aforesaid, of or in the said residuary personal estate of the said [*testator*], should be assigned to the said [*trustees*] in manner hereinafter appearing, upon the trusts and with and subject to the powers and provisions hereinafter declared concerning the same: AND WHEREAS pursuant to an agreement in this behalf entered into upon the treaty for the said intended marriage, the said [*husband*] has effected an assurance on his own life in the names of the said [*trustees*] in the office of the —— Assurance Society, for the sum of £——, by a policy, numbered ——, under the annual premium of £——, and also another assurance, &c.; And it has been agreed that the said respective policies and all monies which may become payable under or by virtue of the same, shall be held in trust for the said [*husband*] until the said intended marriage, and thereafter upon the trusts and with and subject to the powers, provisions and declarations hereinafter declared and contained concerning the same: AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said [*husband's father*] should enter into the covenant on his part hereinafter contained for payment of the sum of £——, and of the interest thereon in manner hereinafter appearing: AND WHEREAS upon the treaty for the said intended marriage it was further agreed that the said [*wife's father*] should enter into the several covenants on his part hereinafter contained for payment of the annuity of £—— hereinafter mentioned, And also with regard to the disposal by his will of his own personal estate; AND WHEREAS [*recital of agreement to settle after-acquired property of wife, ante*, p. 544]. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement in this behalf and in consideration of the said intended marriage, the said [*wife*], with the approbation of the said [*husband*] (hereby testified), hereby assigns and as settlor conveys unto the said [*trustees*], their executors and administrators, FIRST, ALL THAT one equal ——th part or share to which she is entitled under the hereinbefore recited will of the said [*testator*] as aforesaid, and SECONDLY, ALL OTHER (if any) the part or parts, share or shares to

of agreement to settle wife's share;

of title to policies and agreement to settle the same;

agreement husband's father to enter into covenant for payment of gross sum;

of agreement by wife's father to pay annuity, &c.

First *testatum.*

Assignment by wife of share of residuary estate.

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

which she is now or will in any event become entitled of or in the residuary personal estate of the said [*testator*], and the investments now or hereafter representing the same respectively, subject nevertheless as to the part or part share or shares secondly hereby assigned to all prior interests affecting the same respectively: To HOLD all the premises hereinbefore expressed to be hereby assigned unto the said [*trustees*], their executors, administrators and assigns: IN TRUST for the said [*wife*] until the solemnization of the said intended marriage, and thereafter, UPON THE TRUSTS, and with and subject to the powers and provisions hereinafter declared and contained concerning the same: AND IT IS HEREBY AGREED AND DECLARED that the said [*trustees*], their executors, administrators and assigns shall stand possessed of the said part or share, parts or shares, and premises hereinbefore expressed to be assigned, as and when the same shall be received by them respectively: UPON TRUST that the said [*trustees*] and the survivor of them and the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall either permit the same premises or such parts thereof as shall be invested in any stocks, funds, shares or securities hereby authorised for investment, to remain in their actual state of investment respectively or shall sell and convert into money the same respectively or such parts thereof as shall not be so invested, and invest the proceeds of such sale and conversion in their or his names or name, &c. [*continue investment clause, ut ante*, p. 545, 554, 558, *or* 562; *power to vary investments, ante*, p. 545]; PROVIDED ALWAYS that every sale and conversion of any stocks, funds, shares and securities for the time being representing the said premises hereby assigned or any part thereof, except of any stocks, funds, shares or securities not hereby authorized for investment, and every investment and transposition of investment in or for any stocks, funds, shares, securities, wherein or wherefor any trust property herein comprised shall be invested or transposed shall during the life of the said [*husband*] and [*wife*] and of the survivor of them be made with their, his or her consent in writing, and after the death of such survivor at the discretion of the said trustees or trustee: AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall, &c. [*trusts of income of* "the premises hereby assigned and the investments for the time being represent-

Habendum.

Trusts of share or shares assigned by wife.

General proviso as to consents to sales and investments.

Usual trusts for wife, husband, and issue of marriage.

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

ing the same," (hereinafter called "the wife's trust fund") *for the wife and husband successively for their lives, ante*, p. 545; *or, if desired, trusts in favour of husband surviving till bankruptcy, &c., ut ante*, p. 575; *usual trusts for issue of marriage, ante*, p. 546; *ultimate trusts for wife in default of issue*, p. 548; *Covenant to settle after-acquired property of the wife, ante*, p. 549]: AND IT IS HEREBY AGREED AND DECLARED that, if the said intended marriage shall take place, the said trustees or trustee shall stand possessed of all monies assured by and receivable under or by virtue of the said respective policies of assurance on the life of the said [*husband*] hereinbefore recited to have been effected, and of the investments for the time being representing the same, and the income thereof respectively, UPON THE TRUSTS, and with and subject to the powers and provisions herein declared and contained concerning the said wife's trust fund, or as near thereto as the deaths of parties, and other circumstances will admit, save and except that if there shall be no child of the said intended marriage, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then subject to the trusts, powers and provisions herein declared and contained concerning the same premises, or by law vested in the said trustees or trustee, the said trustees or trustee shall stand possessed of the said policy monies, or so much thereof as shall not have been applied under any such trusts, powers, or provisions, and the investments and income thereof, IN TRUST for the said [*husband*], his executors, administrators and assigns [*covenants by husband for keeping up policies and such other provisions relating thereto as may be thought expedient, ut ante*, p. 559, *and see ante*, p. 577]: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance of the said agreement in this behalf, the said [*husband's father*] hereby covenants with the said [*trustees*] in manner following, that is to say, that if the said intended marriage shall be solemnized, he the said [*husband's father*], his heirs, executors, or administrators will, within six calendar months thereafter, pay to the same trustees or trustee the sum of £——, with interest thereon at the rate of 4 per cent. per annum from the day of the solemnization of the said intended marriage; And also as long after the expiration of such six months as aforesaid as the said sum of £——, or any part thereof, shall remain unpaid, will pay to the said trustees or trustee interest on the said sum, or so much

Declaration of trusts of policy monies.

Second *testatum*.

Covenant by husband's father for payment of gross sum and interest.

thereof as shall for the time being remain unpaid, at the same rate, by equal half-yearly payments, whereof the first shall be made at the end of six calendar months next after the solemnization of the said intended marriage; PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall not require payment of the said sum of £——, or any part thereof, in the lifetime of the said [*husband's father*], or within twelve calendar months after his death, except upon the request in writing of the said [*husband*] and [*wife*] and the survivor of them, and, after the death of such survivor, in the lifetime of the said [*husband's father*], or within twelve calendar months after his death, without the concurrence of all the trustees of these presents for the time being if more than one, and that the said trustees or trustee shall not be responsible for any loss occasioned by their or his omission to require payment of the said sum of £—— in the lifetime of the said [*husband's father*], or within twelve calendar months after his death, except when so required as aforesaid; AND IT IS HEREBY AGREED AND DECLARED, that the said trustees or trustee shall stand possessed of the said sum of £—— hereinbefore covenanted to be paid by the said [*husband's father*] as and when the said sum, or any part thereof, shall have been received, UPON TRUST to invest the same in manner aforesaid, with the like power to vary such investments; and shall stand possessed of the same sum of £——, and the investments representing the same (hereinafter called "the husband's trust fund") and the income thereof respectively, UPON TRUST to pay the income thereof unto the said [*husband*] and his assigns during his life; And from and after his death to pay and apply the same premises respectively upon the trusts and subject to the powers and provisions hereinbefore contained or referred to concerning the said monies assured by and receivable under or by virtue of the said policies of assurance hereinbefore recited to have been effected on the life of the said [*husband*], and the investments and income thereof: AND THIS INDENTURE WITNESSETH, that in pursuance of the agreement in this behalf, and for the consideration aforesaid, the said [*wife's father*], with the privity and approbation of the said [*husband*] and [*wife*], hereby covenants with the said [*trustees*] that, if the said intended marriage shall be so solemnized, he the said [*wife's father*] will, during the life of him the said [*wife's father*], and so

XI. **Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.**

Proviso that trustees shall not compel payment of sum, unless required so to do.

Declaration of trusts of sum covenanted to be paid by husband's father.

Third *testatum.*

Covenant by wife's father for payment of an annuity.

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

long as the said [*husband*] and [*wife*], or the survivor of them, or any issue of the marriage shall be living, pay to the said trustees or trustee the yearly sum of £—— by equal half-yearly payments, the first of such payments to be made at the end of six calendar months after the marriage; AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall from time to time, while the said yearly sum of £—— shall be payable, pay and apply the same to the person or persons, for the purposes, and in the manner, to whom, and for and in which the income of the said wife's trust fund would for the time being be payable or applicable, under or by virtue of the trusts, powers, and provisions hereinbefore declared concerning the same; PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall not require payment of the said yearly sum of £——, or any part thereof, except upon the request in writing of the said [*husband*] and [*wife*], or the survivor of them, and after the death of such survivor of them without the concurrence of all the trustees for the time being of these presents, if more than one; And that the said trustees or trustee shall not, nor shall any of them be responsible for any loss occasioned by reason of their or his not having enforced the covenant lastly hereinbefore contained except when so required as aforesaid; AND the said [*wife's father*] hereby further covenants with the said [*trustees*], that if the said intended marriage shall take place, he the said [*wife's father*] will by his last will effectually give, devise, bequeath, or appoint to the said trustees or trustee such part of the real

Trusts of annuity.

Proviso that trustees shall not compel payment of annuity, unless required so to do.

Covenant by wife's father to bequeath to her a share of his estate equal to that of any other child (*p*).

(*p*) The insertion of covenants of this nature, though not unusual, is not generally to be recommended, as they are liable to give rise to serious disputes and difficulties. They attach only to that portion of the covenantor's property which he happens to die possessed of, without interfering with his power of squandering or disposing of it in his lifetime, and thus lack that element of certainty as regards the subject-matter which is important in a marriage settlement. Moreover, such covenants embrace only children living at the decease of the covenantor when his will takes effect to the exclusion of those dying in the covenantor's lifetime. And even if the covenant takes effect the enforcement of it may throw upon the trustees the trouble and responsibility of interfering in, or even of taking entirely upon themselves the administration of the covenantor's estate.

For authorities on such covenants, see Vaizey on Settlements, Vol. I., pp. 213 *et seq.* The covenant in the text is adapted from Byth. and Jarm. Conv., 1st ed., Vol. IX., p. 433.

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

and personal estate of or to which he shall be possessed or entitled, or over which he shall have any power of appointment or disposal at the time of his death, as shall be equal at the least to one equal aliquot part or share, according and in proportion to the number of the children of the said [*wife's father*] who shall be living at his death, or who shall have died in his lifetime leaving issue living at his death, of the residue of such real and personal estate which shall remain after payment and satisfaction of his funeral and testamentary expenses and debts, and of any specific and pecuniary legacies, to an aggregate amount or value not exceeding £——, which may be bequeathed by him by such will or any codicil thereto [*or*, to an amount or value not exceeding in the whole one ——th part of such residue after payment thereout of his debts and testamentary expenses only]; subject nevertheless to any estate or interest to which [*wife's mother*] is or may become entitled for her life if she shall survive the said [*wife's father*] under any existing deed, will, or codicil, or which the said [*wife's father*] may give, devise, bequeath, or appoint to her by his last will or any codicil thereto (which he is hereby expressly empowered to do), of or in such his real and personal estate as aforesaid, or any part thereof respectively: PROVIDED ALWAYS that all monies or property which may at any time or times hereafter, under or by virtue of any appointment exerciseable by the said [*wife's father*], by deed, will, or otherwise, and either by him alone or jointly with any other person or persons, and whether exercisable generally or specially (except as is hereinafter otherwise provided) in favour of his children or other issue or any of them, or in default of such appointment go to or devolve upon, or be advanced, paid, or given, or be agreed to be appointed, advanced, paid, or given, unto or for the benefit of any of his children or the issue of any such children, exceeding in amount or value at any one time the sum of £——, or at several times within one year the sum of £——, shall (though constituting a debt) not be deducted in estimating the value of such residue of the real and personal estate of the said [*wife's father*] as aforesaid, but shall be deemed to be part of the share or respective shares of the child, or children or issue to or for the benefit of whom the same shall have been appointed, advanced, paid, or given, or agreed so to be respectively, or upon whom the same shall have devolved in default of appointment as aforesaid, and shall be brought

Advances to children to be brought into hotchpot.

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

into hotchpot and accounted for accordingly; PROVIDED ALWAYS that all and every sums and sum of money which shall or may at any time hereafter be appointed, advanced, paid, or given by the said [*wife's father*] for the maintenance and education of any his child or children or issue respectively, or for apprenticing to any trade or business, or for paying the fees for admission to any profession or personal outfit of any such child or children or issue respectively [and all and every sums and sum of money and property which the said children or issue or any of them shall derive from any person or persons other than the said [*wife's father*] or under or by virtue of any special power of appointment in favour of such children or issue or any of them, or of selection and distribution among them only, exercised by him the said [*wife's father*] (*r*)] shall not be deemed as part of the share or respective shares of such child or children or issue within the meaning of the proviso lastly hereinbefore contained: PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said [*wife's father*] shall not effectually give, devise, bequeath, or appoint in manner aforesaid such part of the residue of his real and personal estate as shall satisfy the covenant in this behalf hereinbefore mentioned, then the heirs, executors, or administrators of him the said [*wife's father*] shall at their own costs and charges within —— calendar months after his death effectually pay, transfer, or assure to the said trustees or trustee such a sum of money or other property as, with the amount or value of the money or property (if any) which shall have been effectually given, devised, bequeathed, or appointed pursuant to the same covenant, will make up the full amount or value of the part hereinbefore covenanted to be given, devised, bequeathed, or appointed to the said trustees or trustee as aforesaid (*s*):

Exceptions (*q*).

(*q*) This agrees with the rule respecting advancements under the hotchpot clause in the Statute of Distributions: see *ante*, p. 313; and see *post*, sub tit. "WILLS," Vol. VII., pp. 720 *et seq.* Some of the questions which covenants of this nature are calculated to produce are excluded by clauses in the text, but it is impossible to exclude every question which may arise.

(*r*) If it is the intention that property appointed under a special power exerciseable by the wife's father in favour of his issue should be excepted, the words in brackets will be inserted.

(*s*) If the covenantor is entitled to real estate or leaseholds, it may be well to insert here a power to partition as follows:—

Power for

PROVIDED ALWAYS that, if, under or by virtue of the cove-

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

PROVIDED ALWAYS and the said [*wife's father*] hereby further covenants with the said [*trustees*] that from the time when any money or property shall become payable or transferable or assurable in possession to the said trustees or trustee, pursuant to the covenants by the said [*wife's father*] in that behalf hereinbefore contained, until the actual payment, assurance, transfer, or appropriation thereof, the heirs, executors, or administrators of the said [*wife's father*] shall pay to the said trustees or trustee interest at the rate of —— per cent. per annum on such a sum as shall be equal in amount or value to the money or property which shall have become so payable or transferable or assurable, or so much thereof as shall for the time being not have been actually paid, transferred, assured, or appropriated: AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall obtain payment or transfer or other assurance (as the case may require) of the monies or property which shall be given, devised, bequeathed, or appointed, or devolve upon them or him under the covenants in this behalf hereinbefore contained, as and when the same shall be payable or transferable, and shall stand possessed thereof and the investments and income thereof, upon the trusts and with and subject to the powers and provisions as are hereinbefore declared and contained concerning the said wife's trust fund: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall at any time, upon the request in writing of the said [*husband*] and [*wife*], or the survivor of them, raise by sale or conversion into money of a competent part of the husband's trust fund and of the wife's trust fund, or of either of such funds, any sum not exceeding £——, and lay out the sum so raised in the purchase of some freehold, copyhold, or leasehold messuage or dwelling-house, situate in England and Wales (but so that any leaseholds be held for an absolute term, of which not less than —— years shall be then unexpired), with suitable offices and outbuildings, and either with or without stables, gardens, or other pleasure grounds, and lands to be held and

Covenant for payment of interest.

Declaration of trusts of monies, &c., to be received under the covenant to bequeath share.

Power to invest trust monies in purchase of a residence (*t*);

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nant by the said [*wife's father*] hereinbefore contained, any undivided share in real estate or leasehold property shall be assured to, or become vested in the said trustees or trustee, it shall be lawful, &c. [*continue ut post*, p. 670, *mutatis mutandis*].

trustees to concur in partition.

(*t*) For a general power to invest trust funds in purchase of land, see *ante*, p. 586.

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

occupied therewith, and in payment of the expenses of and incidental to such purchase, and also (if the said trustees or trustee shall in their discretion think fit) of the expenses of and incidental to putting into good repair and condition the said messuage so to be purchased, and of making the same and the gardens and pleasure grounds thereof (if any) fit for convenient habitation and occupation; and shall cause the same messuage, and premises, when so purchased, to be conveyed and assured unto and to the use of the said trustees or trustee and their or his heirs, executors, administrators, and assigns respectively, according to the nature or quality thereof respectively, to be held by them or him, UPON TRUST upon the request in writing of the said [*husband*] and [*wife*], and the survivor of them, and, after the death of such survivor, at the discretion of the said trustees or trustee, to sell the said messuage and premises so purchased or any part thereof: AND IT IS HEREBY AGREED that the said trustees or trustee shall stand possessed of the net proceeds which shall arise from any such sale as aforesaid, subject to the payment thereout of the expenses incurred in or about such sale, or otherwise in or about the execution of any of the trusts aforesaid, upon the same trusts and with and subject to the same powers and provisions upon with and subject to which the money laid out in the purchase of the said messuage and premises or the part thereof so sold would then have been held if the same had not so been laid out: PROVIDED ALWAYS that the said trustees or trustee shall until such sale permit the said [*husband*] and [*wife*] and the survivor of them to have the personal use and occupation of the same messuage and premises as a residence so long as they, he, or she shall live and think fit to reside in the same messuage, they, he, or she keeping the messuage, furniture, and premises insured against fire to the full value thereof in the names of the said trustees or trustee, and also keeping the same messuage in tenantable repair, and paying the taxes and other outgoings affecting the same; with power for the said [*husband*] and [*wife*], or the survivor of them, and, after the death of such survivor, for the said trustees or trustee to demise the said messuage and premises or any part thereof for any term not exceeding twenty-one years to take effect in possession or within six calendar months of the date of the lease at the best rent that can be obtained without taking a premium subject to a power of re-entry if the rent

trust for resale;

trusts of proceeds of resale.

Proviso as to occupation and letting residence, purchased.

should be in arrear for twenty-one days: and the rents and profits of the said messuage and premises, or of the unsold part thereof shall be paid and applied in like manner as the income arising from the proceeds of the sale of the same premises would be payable or applicable if the same were sold; PROVIDED ALWAYS [*proviso for indemnity of trustees in respect of leaseholds, ante*, p. 588; *power to apportion blended funds, ante*, p. 579; *power to appoint trustees, ante*, p. 552, *or* p. 590; *trustee clauses, ante*, p. 552.]

XI. Of Wife's Share of Personal Estate under a Will, and Policies on Husband's Life.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XII. *SETTLEMENT on* MARRIAGE *of the* INTENDED WIFE'S REVERSIONARY INTEREST *in a sum of Stock and of a* POLICY *of* ASSURANCE *on the* LIFE *of the* HUSBAND, TRUST *to pay* ANNUITY *to* WIFE *and* SUBJECT *thereto to pay* INCOME *to* HUSBAND *for life or until* ALIENATION, &c.; REMAINDER *to* WIFE *for* LIFE. TRUSTS *for benefit of the* CHILDREN *of the* INTENDED *Marriage, and also of the* CHILD *of the* HUSBAND *by a* FORMER WIFE (*t*).

THIS INDENTURE (*u*), made the —— day of ——, 18—, BETWEEN [*intended wife*], of, &c., spinster, of the first part; [*intended husband*], of, &c., of the second part; and [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the third part; WHEREAS [*recite intended marriage, ante*, p. 544]; AND WHEREAS under the will of [*testatrix*], of, &c., deceased, an aunt of the said [*wife*], dated, &c., and proved, &c., the said [*wife*] is entitled to a sum of £——, $2\frac{3}{4}$ per cent. Consolidated Stock now standing in the names of [*executors*] the executors and trustees of the said will subject to a life interest therein of the said [*wife's mother*]; AND WHEREAS pursuant to an agreement entered into upon the treaty for the said intended marriage the said [*husband*] has effected an assurance on his own life,

Parties.

Recitals: of wife's title to reversionary interest;

of assignment of policy, and agreement for settlement thereof;

(*t*) This is a reasonable arrangement where the husband has only a life-income derived from his profession or other sources.

(*u*) Stamp, 5*s*. per 100*l*. or part of 100*l*. of value of reversionary interest, and on amount assured by the policy.

XII. Of Reversionary Interest of Wife under a Will, and a Policy on the Husband's Life.

and in his own name for the sum of £—— with the —— Assurance Society by a policy dated the —— day of ——, 18—, and numbered ——, and under the annual premium of £——, and has by an assignment, but bearing even date with, but executed before these presents, and made according to the form prescribed in the Schedule of the Policy of Assurance Act, 1867, and endorsed on the said policy, assigned the same policy to the said [*trustees*]; And it has been agreed that the same shall be held in trust for the said [*husband*] until the said intended marriage, and thereafter upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same; AND WHEREAS upon the treaty for the said intended marriage it was further agreed that in consideration of the said assignment by the said [*husband*] of the said policy, and the settlement thereof hereinafter contained, [*son*] the infant son of the said [*husband*] by his late wife [*name*] should be admitted to share in the said sum of stock intended hereby to be brought into settlement by the said [*wife*] in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement in this behalf, and in consideration of the said intended marriage, the said [*wife*] hereby assigns, and as settlor conveys unto the [*trustees*], their executors, administrators, and assigns, All that sum of £——, $2\frac{3}{4}$ per cent. Consolidated Stock to which she is entitled as aforesaid, subject to the life interest therein of the said [*wife's mother*], And all other (if any), the trust funds to which the said [*wife*] is or may become entitled under the said will, and the securities for the same, To HOLD the said premises unto the said [*trustees*], their executors, administrators, and assigns, IN TRUST for the said [*wife*] until the said marriage, and thereafter UPON THE TRUSTS, and with, and subject to the powers and PROVISIONS hereinafter declared and contained concerning the same: AND IT IS HEREBY AGREED AND DECLARED that the said [*trustees*], and their executors, or administrators, and assigns, shall, from and after the said intended marriage stand possessed of the said sum of £—— $2\frac{3}{4}$ Consolidated Stock, and premises hereby assigned, UPON TRUST that they, the said [*trustees*], or the

of agreement that son by former wife shall share in trust funds (*v*).

Testatum.

Intended wife assigns reversionary stock.

Habendum.

Declaration of trusts.

Trust for investment.

(*v*) This bargain here recited will, it is conceived, be sufficient to support against creditors the settlement as regards the provisions in favour of the child of the former marriage: see *ante*, pp. 171 *et seq.*

XII. Of Reversionary Interest of Wife under a Will, and a Policy on the Husband's Life.

survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee of these presents (hereinafter called "the said trustees or trustee") shall either allow the said trust premises as and when the same shall fall into possession, and be received by them, the said trustees or trustee to remain &c., [*continue trust for investment, ante, p.* 545; *investment clause, ante, pp.* 545, 554, 558, 562; *power to vary investments, ante, p.* 545;] AND shall during the joint lives of the said [*husband*] and [*wife*], out of the income of the said trust premises, and the investments for the time being representing the same, pay an annuity or yearly sum of £—— to the said wife, to commence from the day of the said intended marriage, and to be payable half-yearly, on the —— day of ——, and the —— day of—— in every year, [*or* the usual quarter days], and the first payment thereof to be made on such of the said days as shall happen next after the said intended marriage, but so that the said [*wife*] shall not have power to anticipate the same; AND shall, during such joint lives pay the residue of the said income to the said [*husband*] during his life, or until he shall do, commit, suffer, or concur, in any act, default, matter or thing, whereby the income of the said trust premises if absolutely belonging to him would wholly or partially become vested in, or payable to or charged in favour of some other person or persons; AND IT IS HEREBY AGREED AND DECLARED, that from and after the determination during the life of the said [*husband*] of the trusts of income hereinbefore declared and contained in his favour, the said trustees or trustee shall stand possessed of the said trust premises, and the income thereof, upon the trusts, and with, and subject to the powers and provisions upon, and with, and subject to which the same would be held if the said [*husband*] were then actually dead: AND from and after the death of the said [*husband*] the said trustees or trustee shall pay the income of the said trust premises to the said [*wife*] and her assigns during her life, but so that she shall not during the said intended coverture, have power to dispose of, or charge such reversionary life interest by way of anticipation: AND it is hereby agreed and declared that from and after the death of the survivor of them the said [*husband*] and [*wife*], the said trustees or trustee shall stand possessed of the said trust premises and the income thereof, UPON TRUST for [*son*], the infant son of the said [*husband*], by his late wife [*deceased wife*], and the child or children or other issue of the said [*wife*],

Trust to pay annuity to wife during joint lives of herself and husband;

and subject thereto for husband till alienation;

and thereafter as if husband were dead;

remainder for wife for life without power of anticipation;

then for husband's infant son, and wife's

XII. Of Reversionary Interest of Wife under a Will, and a Policy on the Husband's Life.

or any of them, for such interest or interests and in such manner as [the said [*husband*] and [*wife*] shall during their joint lives by deed jointly appoint, And in default of, and subject to such joint appointment as] the said [*wife*] shall (notwithstanding any coverture) by deed or will appoint; And subject thereto, In trust for the said [*son*], if he shall attain the age of twenty-one years, and such child or children of the said [*wife*] as shall attain that age, or, being a daughter or daughters, marry in equal shares, if more than one; But so that the said [*son*] shall not, nor shall any child of the said [*wife*], take, both by appointment and in default of appointment, a greater share than he or she would have taken if no appointment had been made; And so that the said [*son*] shall not take, both by appointment and in default of appointment, more than one equal fourth part of the said trust premises; And so that no appointment shall operate so as to reduce the share of the said [*son*] below the amount which he would have taken if no appointment had been made, unless the said [*husband*] shall [concur in or] by writing assent to such appointment; [Provided always, and it is hereby agreed, that if the trust hereinbefore declared in favour of the said [*husband*] shall determine in his lifetime, the power hereinbefore given to him jointly with the said [*wife*] of making appointments in favour of the issue of the said intended marriage shall not be exerciseable after such determination; but so that the said husband may assent to such reduction of the share of the said [*son*] notwithstanding such determination.] And it is hereby agreed and declared, that if the said intended marriage shall take place the said trustees or trustee shall stand possessed of all monies assured by and receivable under or by virtue of the said policy of assurance on the life of the said [*husband*] hereinbefore recited to have been so assigned as aforesaid, and of the investments for the time being representing the same, and the income thereof, Upon the trusts, &c., [*continue declaration of trusts, ut ante, p.* 594; *Covenants by husband for keeping up policies, and such other provisions relating thereto as may be thought expedient, ante, p.* 559, *and see p.* 577; *trustee clauses, ante, p.* 552].

In witness, &c.

children as she shall appoint; in default of appointment equally at twenty-one or marriage.

Hotchpot clause.

Son's share not to be diminished without his father's consent.

Proviso that husband's power of concurring in appointments shall not be exerciseable after bankruptcy, &c. (*x*).

Declaration of trusts of policy monies.

(*x*) See *ante*, p. 576, note (*h*).

XIII. *SETTLEMENT on* MARRIAGE *with the* SANCTION *of the* COURT *under the* INFANTS' SETTLEMENT ACT (18 *&* 19 *Vict. c.* 43) *of the* WIFE'S REVERSIONARY INTEREST *to which she is entitled in the Personal Estate of a Testator* (VARIATIONS *in Brackets where the* WIFE *is a* WARD OF COURT, *and the Estate is being administered by the Court*).

THIS INDENTURE (*y*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., an infant of the age of —— years, of the second part; and [*trustee*], of, &c., [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS a marriage is intended shortly to be solemnized between the said [*husband*] and [*wife*], with the consent of [*wife's mother*], the mother and guardian of the said [*wife*]; AND WHEREAS under the will of [*testator*], late of, &c., deceased, dated, &c., and proved, &c., the said [*wife*] will upon the said intended marriage become absolutely entitled to one moiety of the net residue, after payment of the funeral and testamentary expenses and debts of the said [*testator*], and certain legacies and expenses directed to be paid by his said will, of the proceeds of sale and conversion of his real and personal estate thereby devised and bequeathed to [*executors*] upon trust for sale and conversion as therein mentioned, subject nevertheless to the life interest of [*testator's widow*] in the said residuary real and personal estate and the proceeds thereof: AND WHEREAS [in the year 18—, an action, *Re* [*testator's*] Will, *A.* v. *B.*, 18—, A. No. ——, was instituted in the Chancery Division of Her Majesty's High Court of Justice, for the administration of the real and personal estate of the said [*testator*], in which action [*plaintiff*] was plaintiff and [*defendants*] were defendants: AND WHEREAS by an order in the said action made by the Honourable Mr. Justice ——, on the —— day of ——, 18—, it was ordered, &c. [*recite order for administration of testator's estate, directing inquiries, &c.* (*z*)]: AND WHEREAS the said [*wife*] has been served with notice of the said order, and has become bound by the proceedings in

Parties.

Recitals: of intended marriage;

of wife's title to reversionary interest under a will;

of administration action;

of order for administration;

(*y*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of value of reversionary interest, and 10*s.* in respect of covenant to settle wife's after-acquired property. Stamp.

(*z*) For a form of order see Seton on Decrees, 848.

XIII. Settlement on Marriage under Infants' Settlement Act.

the said action: AND WHEREAS the chief clerk has made his certificate in the said action, dated, &c., and filed, &c., in which certificate and the schedules thereto the testator's real and personal estate and the liabilities at the time of his death affecting the same are set forth, and by which certificate it appears that] the said liabilities have now been all paid and discharged, and [that] the parts of the testator's real estate now outstanding and undisposed of consist of the messuages, lands, and hereditaments situate in the parishes of —— and ——, in the county of ——, the particulars whereof are set out in the schedule hereunder written and in the first part thereof, and [that] the net residue of the said testator's personal estate consists of or is represented by the sums of money, stocks, funds, shares, and securities specified in the same schedule and in the second part thereof, all which monies, stocks, funds, shares, and securities are now held by or standing in the names of the said [*executors*]: AND WHEREAS upon the treaty for the said intended marriage it was agreed that, subject to the sanction and approbation of the Court being obtained, the said moiety or share to which she is so entitled as aforesaid, subject to the life interest of the said [*testator's widow*] therein, of and in the said net residue of the proceeds of sale and conversion of the said testator's real and personal estate, should be assigned in manner hereinafter appearing to the said [*trustees*], to be held upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same; AND WHEREAS [*recite agreement for settlement of wife's after-acquired property, ante*, p. 544]; AND WHEREAS upon the treaty for the said intended marriage it was agreed that further provision should be made for the said [*wife*] by a settlement of certain lands and hereditaments situate, &c., belonging to the said [*husband*], which settlement has been effected by an indenture bearing even date with, but executed before the execution of these presents, and expressed to be made between [*parties*]; AND WHEREAS by an order of the Chancery Division of the said High Court of Justice, made in Chambers on the —— day of ——, 18—, [in the said action] and in the matter of [*wife*] an infant by her next friend and in the matter of an Act of Parliament of the 18th and 19th Vict. c. 43, intituled "An Act to enable Infants, with the approbation of the Court of Chancery, to make binding Settlements of

of chief clerk's certificate;

of agreement for settlement of wife's property;

of agreement for settlement of realty of even date;

of order of Court sanctioning settlement.

XIII. Settlement on Marriage under Infants' Settlement Act.

their Real and Personal Estate on Marriage," upon the application of the said [*wife*] by [A. B.], her next friend, and of the said [*wife's mother*], her guardian, the said Judge, being of opinion that [the said intended marriage is a fit and proper marriage, and that] the settlement proposed to be effected by these presents is a proper settlement to be made in contemplation of the said intended marriage, and that this indenture is a proper indenture for giving effect to such settlement, has, pursuant to the said Act of Parliament, sanctioned and approved of such settlement, and has ordered that the said infant be at liberty, in contemplation of her marriage with the said [*husband*], to execute these presents accordingly: NOW THIS INDENTURE WITNESSETH, that in obedience to the hereinbefore-recited order of the —— day of ——, 18—, and in consideration of the said intended marriage, the said [*wife*], with the sanction of the Chancery Division of the said High Court of Justice, and with the approbation of the said [*husband*], hereby assigns, and as settlor conveys unto the said [*trustees*], their executors, administrators, and assigns, ALL THAT the said moiety to which the said [*wife*] is entitled under the hereinbefore-recited will of the said [*testator*] of and in the net residue of the proceeds of sale and conversion of his real and personal estate in remainder expectant on the decease of the [*testator's widow*], and subject to her life interest therein as hereinbefore mentioned, TO HOLD the same subject to the life interest of the said [*testator's widow*] therein, UNTO the said [*trustees*], their executors, administrators, and assigns (*a*), upon such trusts, and with and subject to such powers and provisions as are hereinafter declared and contained concerning the same; [AND the said [*husband*] hereby covenants with the said [*trustees*] that the said [*wife*], and every person claiming under her, will at all times hereafter, at the request of the said [*trustees*] or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents,

Testatum.

Assignment by ward of Court of her reversionary share.

Covenant by husband for further assurance by wife (*b*).

(*a*) It does not seem necessary or strictly correct to insert here the usual trust till marriage, as the settlement only takes effect in case the marriage takes place.

(*b*) It may be well to insert this covenant, if the husband will consent to enter into it, so as to obviate any question which might be raised as to whether an infant settling property under the sanction of the Court would be bound by covenants for title.

XIII. Settlement on Marriage under Infants' Settlement Act.

(hereinafter called "the said trustees or trustee"), and at the cost of the trust property hereby settled, execute and do all assurances and things for further and more perfectly assuring the trust premises hereby assigned, or any part thereof, to the said trustees or trustee, subject as aforesaid, and enabling them or him to obtain possession of and receive the same as by him may reasonably be required;]

Trusts of wife's portion;

AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall after the said marriage stand possessed of or interested in the monies, stocks, funds, shares, securities or other property for the time being representing the said moiety of the said [*wife*] of and in the net residue of the proceeds of sale of the real and personal estate of the said [*testator*] and premises hereinbefore expressed to be assigned to the said [*trustees*], as and when such last mentioned premises shall have fallen into possession, UPON TRUST that the said trustees or trustee shall, as to such parts of the premises hereby assigned, as shall consist of or be represented by stocks, funds, shares, securities or other property, not hereby authorized for investment, forthwith sell, get in, and convert the same into money, and shall invest the monies to arise from such sale or conversion, and all monies which shall represent any part of the premises hereby assigned, as and when the same shall be received by them or him in manner hereinafter mentioned: AND as to such parts of the premises hereby assigned as shall consist of stocks, funds, shares or securities hereby authorized for investment, may either allow the same to remain in their actual state of investment, or shall with the consent in writing of the said [*husband*] and [*wife*] during their joint lives, and of the survivor of them during his or her life, and so that the consent of the said wife may be effectual notwithstanding her infancy (*c*), and after the death of such survivor at the discretion of the said trustees or trustee, sell and convert the same into money and invest the proceeds of such sale and conversion in manner hereinafter mentioned; AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall, with such consent or at such discretion as aforesaid, invest all trust monies which shall come into their or his hands under or by virtue of the trusts or provisions of these presents in their or his names or name in, &c. [*con-*

to get in property not invested as authorised;

to continue authorised investments;

trust for investment.

(*c*) See *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 228.

tinue investment clause, ut ante, pp. 545, 554, 558 *and* 562; *power to vary investments, ante*, p. 545]: AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall stand possessed of the said moiety of the said [*wife*] and premises hereby assigned to the said [*trustees*] and the investments for the time being representing such trust premises respectively (hereinafter called "the said trust fund") and the income thereof respectively upon the trusts following, that is to say, UPON TRUST that the said trustees or trustee shall pay the income of the said trust fund or of so much thereof as shall for the time being have been received by or come into the possession of the said trustees or trustee to the said [*wife*] during her life, for her separate use, without power of anticipation during any coverture; AND, after her death shall pay the said income to the said [*husband*] if he shall survive her during the residue of his life: AND, from and after the determination of the trusts hereinbefore declared in favour of the said [*husband*] and [*wife*], shall stand possessed of and interested in the said trust fund and the income thereof: IN TRUST for all and every or such one or more exclusively of the others or other of the children or remoter issue of the said intended marriage born in the lifetime of the said [*husband*] and [*wife*] or the survivor of them, other than and except an eldest or only son of the said intended marriage, and also except any younger son who before the time when he shall have attained a vested interest by appointment in his favour or otherwise shall by the death of his elder brother or brothers under the age of twenty-one years and without leaving issue respectively become an eldest or only son [And also except an eldest or only daughter of the said intended marriage in case there shall be no son thereof or being a son or sons, such son or sons shall before an appointment shall have been made in favour of such eldest or only daughter have died under the age of twenty-one years and without leaving issue; and also except any younger

XIII. **Settlement on Marriage under Infants' Settlement Act.**

Trusts of income.

Trusts for issue of marriage other than an eldest or only son, and his issue (*d*), as the husband and wife, or the survivor shall appoint;

(*d*) This trust is applicable where real estate is at the time of the marriage in settlement, or is then settled by a separate deed, under which on the death of the intended husband, his eldest or only son will succeed to the estate as tenant in tail, and thus be sufficiently provided for. The words in brackets will be added throughout these trusts where in default of sons it is intended to exclude an eldest or only daughter and her issue.

XIII. Settlement on Marriage under Infants' Settlement Act.

daughter who before the time of any appointment in her favour shall by the death of her elder sister or sisters under the age of twenty-one years and without leaving issue respectively become such eldest or only daughter as aforesaid] and also except the issue of any son [or daughter] so excepted as aforesaid at such age or time or respective ages or times, and if more than one in such shares and proportions and subject to any such annual sums of money and future or executory or other trusts for the benefit of any of the objects of this present power and with such provisions for the advancement or otherwise for the benefit and upon such conditions, with such restrictions and generally in such manner as the said [*husband*] and [*wife*] shall jointly by deed with or without power of revocation from time to time appoint, and in default of such appointment and so far as any such appointment shall not extend then as the survivor of them the said [*husband*] and [*wife*] shall at any time or times after the decease of either of them by deed with or without power of revocation and new appointment, or by will or codicil appoint: PROVIDED ALWAYS that the said [*husband*] shall not be entitled to exercise the last mentioned power by deed or will or codicil at any time after he shall have survived the said [*wife*] and the trusts hereinbefore declared in his favour shall have determined, and any will or codicil made by him before such determination as last aforesaid shall not after such determination operate as an exercise of such powers: AND in default of any appointment under the powers hereinbefore contained or either of them and so far as any such appointment shall not extend, IN TRUST for all and every the children and child of the said intended marriage who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, other than and except an eldest son or only son of the said intended marriage, and also except every younger son who, by the death of his elder brother or brothers under the age of twenty-one years and without leaving issue respectively, shall become an eldest or only son, [and also except an eldest or only daughter of the said intended marriage in case there shall be no son thereof, or being a son or sons thereof, such son or sons shall die under the age of twenty-one years and without leaving issue respectively, and also except any younger daughter who shall by the death of her elder sister or sisters under the age of

Trust, in default of appointment, for younger children equally.

XIII. Settlement on Marriage under Infants' Settlement Act.

twenty-one years and without leaving issue respectively become such eldest or only daughter as aforesaid,] to be divided between or amongst such children, except as aforesaid, if more than one in equal shares, and if there shall be but one such child, then the whole to be IN TRUST for such one child: PROVIDED ALWAYS that, in default of any such direction or appointment as aforesaid to the contrary, no child who or whose issue shall take any part of the said trust fund under or by virtue of any direction or appointment to be made by the said [*husband*] and [*wife*] jointly, or by the survivor of them, as hereinbefore is provided, shall have or be entitled to any share of or in that part of the said trust funds of which no such direction or appointment shall have been made, without bringing the share or shares appointed to him, or her, or to his or her issue, into hotchpot and accounting for the same accordingly; And if there shall not be any son of the said intended marriage, other than and except any such eldest or only son as aforesaid, who shall attain the age of twenty-one years, nor any daughter who shall attain the age of twenty-one years or marry, then IN TRUST for the only son, if any, of the said intended marriage who shall live to attain the age of twenty-one years: [And if there shall not be any son of the said intended marriage who shall attain the age of twenty-one years, nor any daughter of the said intended marriage other than and except any such eldest or only daughter as aforesaid who shall attain the age of twenty-one years or marry, then IN TRUST for the only daughter, if any, of the said intended marriage who shall attain the age of twenty-one years or marry]: AND THIS INDENTURE ALSO WITNESSETH, &c. [*covenant to settle after-acquired property of the wife, ante,* p. 549]: PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said [*wife*] shall survive the said [*husband*], it shall be lawful for the said [*wife*] at any time or times after the death of the said [*husband*], and whether she shall be covert or sole, by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil, to appoint in favour of any husband with

Hotchpot clause.

Trusts in default of younger children.

Second *testatum.*

Power for wife to appoint to a future husband and her children by him a moiety of the trust funds (*e*).

(*e*) In a settlement of the property of a female infant the Court will require provision to be made out of her fortune for the issue of a future marriage: *Rudge* v. *Winnall*, 11 Beav. 98. Alternative forms of clauses making such provision will be found in Precedent I., *ante*, p. 550.

XIII. Settlement on Marriage under Infants' Settlement Act.

whom she may intermarry after the death of the said [*husband*], and of her child or children by any future husband or husbands with whom she may intermarry after the decease of the said [*husband*], any part not exceeding one-half of the said trust fund hereby settled or covenanted or agreed to be settled by or on the part of the said [*wife*] in favour of any such future husband, and the child or children of the said [*wife*] by every or any such future husband, but so that no such future husband shall by virtue of any such appointment take any greater interest in such property than for his life, and that the trusts, powers, and provisions in favour of the child or children of the said [*wife*] by any such future husband shall be similar to those herein declared in favour of the child or children of the now intended marriage, failing which trusts, the portion of trust property to be appointed under this power shall remain subject to the trusts of this settlement, and so that no child or children of any such future marriage shall, by virtue of any such appointment, become entitled to any share or portion exceeding in amount or value the share or portion which, in the absence of any appointment under the power of appointment hereinbefore contained, a child of the now intended marriage would take or become entitled to in the said trust fund hereby settled or agreed to be settled, And so that the interest or share of property to be appointed under this power shall not be withdrawn from the trusteeship of these presents until absolutely and indefeasibly vested in some person in possession.

In witness, &c. (*e*).

The Schedule above referred to.

The First Part.

The Second Part.

(*e*) Notice of this settlement must be given to the trustees of the will.

A reference to the record must be endorsed on the first skin of the engrossment; and the engrossment must be verified by affidavit. For a form of such affidavit, see R. S. C., App. L., Form 24.

XIV. *SETTLEMENT on* MARRIAGE, *of* STOCKS, *&c., belonging to the Intended* HUSBAND, *and of a* LEGACY *belonging to the Intended* WIFE (*an* INFANT); *The* LIFE-INTEREST *of the* WIFE *in the* PROPERTY *settled by the* HUSBAND *being made* CONDITIONAL *on her* CONFIRMATION *of the Settlement when she comes of age.* COVENANT *by the* HUSBAND *to* CONFIRM *the Settlement.*

THIS INDENTURE (*f*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., being an infant of the age of —— years or thereabouts, of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS [*recite intended marriage, ante*, p. 544]; AND WHEREAS the said [*husband*] is absolutely entitled to the stocks, funds, shares, and securities specified in the first schedule hereunder written; And, upon the treaty for the said intended marriage, it was agreed that the same should be transferred to the said trustees in trust for the said husband until the said intended marriage, and thereafter upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same; AND WHEREAS the said [*wife*] is absolutely entitled under the will of [*testator*], late of, &c., deceased, dated, &c., and proved, &c., to a legacy or sum of £——, which is now represented by the several stocks, funds, shares, and securities specified in the second schedule hereunder written, now standing in the names of [*executors*], the executors of the said will; And, upon the treaty for the said intended marriage, it was agreed that the same legacy should be assigned in manner hereinafter appearing to the said [*trustees*], To HOLD the same upon trust for the said [*wife*] until the said intended marriage, and thereafter upon the trusts, and with and subject to the powers and provisions hereinafter declared of and concerning the same; AND WHEREAS the transfer to be made as aforesaid of the said stocks, funds, shares, and securities to the said [*trustees*] is intended to be forthwith made and perfected: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in

Parties.

Recitals: of intended marriage; of husband's title to stocks, &c., and agreement for settlement thereof;

of wife's title to legacy, and agreement for settlement thereof;

of transfer to trustees of husband's stocks, &c.

Testatum.

(*f*) Stamp, 5*s.* per 100*l.*, or part of 100*l.*, of value of property settled by husband and wife respectively.

XIV. Settlement on Marriage of Infant subject to Confirmation.

consideration of the said intended marriage, it is hereby agreed and declared that the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee"), shall stand possessed of the several stocks, funds, shares, and securities specified in the said first schedule hereunder written, and the monies, stocks, funds, shares, or securities into or for which the same respectively, or any part thereof, may be converted or transposed (hereinafter called "the husband's trust fund"), UPON the trusts, and with and subject to the powers and provisions hereinafter declared concerning the same: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance of the said agreement in this behalf, and for the consideration aforesaid, the said [*wife*], with the approbation of the said [*husband*], hereby assigns, and as settlor conveys, ALL THAT legacy or sum of £—— so bequeathed to her as aforesaid, and all investments now or hereafter representing the same, and all monies to become due and payable in respect of the same legacy, TO HOLD the said legacy and premises (hereinafter called "the wife's trust fund") unto the said [*trustees*], their executors, administrators, and assigns, UPON TRUST for the said wife until the said intended marriage, and thereafter UPON THE TRUSTS and with and subject to the powers and provisions hereinafter declared of and concerning the same: AND IT IS HEREBY AGREED AND DECLARED [*set out trusts of husband's trust fund and wife's trust fund respectively, ut ante, in Precedent X.*, p. 585; *and continue as follows*]: PROVIDED ALWAYS, and it is hereby agreed and declared, that the life interest hereinbefore given to the said [*wife*] in the said husband's trust fund is conditional upon her confirming the settlement hereby intended to be made of the wife's trust fund and premises hereinbefore expressed to be assigned by her, and that she shall execute a proper deed confirming such settlement, and also shall make, execute and do, or cause to be made, executed and done, all transfers, assurances, acts, and things which may be necessary or expedient for the purpose of effectually vesting the said wife's trust funds, and the investments for the time being representing the same, in the said trustees or trustee within six calendar months of the day when she shall attain the age of twenty-one years, and if she shall refuse or neglect

Agreement that husband's trust fund shall be held upon trusts to be declared.

Second *testatum.*

Assignment of legacy.

Habendum.

Upon trusts to be declared.

Proviso that wife's life-interest in husband's trust fund shall not take effect unless she shall confirm the settlement on coming of age.

XIV. Settlement on Marriage of Infant subject to Confirmation.

so to do within the time aforesaid, then and in such case the life interest hereinbefore given to the said [*wife*] in the said husband's trust fund shall, immediately upon the expiration of the six calendar months aforesaid, absolutely determine or fail to take effect, and the trusts, powers, and provisions hereinbefore declared and contained concerning the said husband's trust fund shall take effect in all respects as if the said [*wife*] were then actually dead; AND the said [*husband*] hereby covenants with the said [*trustees*] that if the said [*wife*] shall die under the age of twenty-one years, or if, after having attained that age, she shall refuse or neglect to confirm this present settlement in manner aforesaid, and if the said [*husband*] shall, under or by virtue of any act or deed of the said wife during her lifetime, or under her will, or as her administrator by virtue of her intestacy, become entitled to the said wife's fund or any part thereof, then and in any of such cases the said [*husband*], his executors or administrators, will forthwith, at the cost of the trust estate, execute, make, and do, or cause to be executed, made and done, all such deeds, assurances, acts, and things as may be necessary for confirming this settlement as respects the said wife's fund, or such part thereof to which she shall so become entitled as aforesaid, and effectually vesting the same in the said trustees or trustee, upon the trusts, and with and subject to the powers and provisions declared and contained concerning the same (*g*) [*Power to apportion blended funds, ante*, p. 579; *trustee clauses, ante*, p. 552].

Covenant by husband to confirm settlement.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

(*g*) If a conditional settlement made of an infant's property on her marriage contains a covenant by her father to pay an annuity or make other provision for her benefit, a proviso to the following or a like effect may be here inserted after such covenant:—

Proviso to be inserted where father covenants to pay annuity, &c.

"PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said [*wife*] shall die under the age of twenty-one years, or if after having attained that age she shall refuse or neglect, within the time aforesaid, to confirm this present settlement in manner aforesaid, then immediately upon her death, or upon the expiration of six calendar months after she shall attain the age of twenty-one years, as the case may

XV. *DEED OF CONFIRMATION by a* WIFE *on attaining* TWENTY-ONE *years of a* SETTLEMENT *made by her while an* INFANT (*h*).

Exordium. TO ALL TO WHOM THESE PRESENTS SHALL COME (*i*) I [*wife*] the wife of [*husband*] of, &c., send greeting:

Recitals: that this deed is supplemental to settlement; WHEREAS these presents are supplemental to an indenture dated, &c., and made between the said [*husband*] of the first part, myself, (therein called [*maiden name*] spinster), of the second part, and [*trustees*] of the third part, being the settlement executed in contemplation of the then intended marriage which was shortly afterwards solemnized between the said [*husband*] and myself; AND WHEREAS I attained the age of twenty-one years on the —— day of —— last, and I have agreed to confirm the said settlement in manner hereinafter appearing: NOW KNOW YE that in pursuance of the said agreement, and in consideration of the provision made in my favour by the said [*husband*] out of the "husband's trust fund" mentioned in the said settlement, I do hereby confirm the said settlement so far as regards the trust funds thereby expressed to be thereby assigned by me and therein called the "wife's trust fund," To THE INTENT that the same settlement shall take effect as fully and effectually in all respects as if I had been, at the time of the execution thereof, of the full age of twenty-one years.

that wife has attained full age.

Confirmation of settlement.

IN WITNESS, &c.

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be, the yearly sum of £—— hereinbefore covenanted to be paid by the said [*wife's father*] shall thenceforth cease to be payable, and the covenant on his part to, &c. [*state effect of provision covenanted to be made*], shall in the event of such death, refusal, or neglect, be absolutely void and of no effect."

(*h*) A confirmation in the above form will be sufficient without any assignment, as regards any equitable interest either in possession or reversion, or any personal chattels expressed to be assigned by the settlement. It will, of course, be necessary to give notice of the confirmation to the trustees of any prior settlement or will under which the wife takes an equitable interest comprised in her settlement. If, however, the settlement made during the wife's infancy comprises any real or leasehold property, such property must be formally conveyed by the wife on attaining full age to the trustees, to hold the same upon the trusts declared in the settlement. As to confirmation of settlements by infants, see *ante*, pp. 148 *et seq.*

(*i*) Stamp, 10*s.*

XVI. *SETTLEMENT on the* MARRIAGE *of a* TRADER, *of stocks, shares, and securities belonging to him upon trust for himself for life* CHARGED *with* MAINTENANCE *of the* WIFE *and* CHILDREN *of the Marriage; and subject thereto upon* TRUSTS *for the Benefit of the* WIFE *and* CHILDREN. POWER *for* TRUSTEES *to* LEND *the Trust Funds to the* HUSBAND *for the purposes of his business.*

THIS INDENTURE (*j*), made the —— day of —— 18—, BETWEEN [*intended husband*] of, &c., of the first part, [*intended wife*] of, &c., of the second part, and [*trustee*] of, &c., and [*trustee*] of, &c., of the third part; WHEREAS [*recite intended marriage, ante*, p. 544]; AND WHEREAS the said [*husband*] is absolutely entitled to the several stocks, funds, shares, and securities, specified in the schedule hereunder written, which have been respectively, pursuant to an agreement entered into upon the treaty for the said intended marriage, transferred or delivered unto the said [*trustees*], in trust for the said [*husband*], his executors, administrators, or assigns, until the said intended marriage and thereafter upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same: NOW THIS INDENTURE WITNESSETH, that, in consideration of the said intended marriage, it is hereby agreed and declared that the said trustees shall from and after the said intended marriage stand possessed of the said stocks, funds, shares, and securities specified in the said schedule, UPON TRUST, that the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall either allow the same premises respectively to remain, &c. [*continue trust for investment, ante*, p. 545; *investment clause*, pp. 545, 554, 558 *and* 562; *power to vary investments, ante*, p. 545]; PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall at any time or times after the solemnization of the said intended marriage, upon the request in writing of the said [*husband*] and [*wife*] during their joint lives or of the said [*husband*], after the death of the said [*wife*], and may if they or he

Parties:

Recitals: of intended marriage; of title of husband to stocks, &c.

Testatum.

Declaration of trusts of stocks, &c., transferred to trustees.

Power for trustees to lend trust funds to husband for purposes of his business.

(*j*) Stamp, 5*s.* per 100*l.*, or part of 100*l.*, of value of the stocks, &c., settled.

XVI. Settlement on Marriage of Male Trader.

the said trustees or trustee shall in their or his discretion think fit upon the like request of the said [*husband*] alone during the life of the said [*wife*], advance and lend to the said [*husband*] for the purposes of his business any sum or sums not exceeding in the whole the sum of £——, out of the proceeds of any sale or sales which the said trustees or trustee are hereby authorized to effect for that purpose of any of the said stocks, funds, shares, and securities specified in the schedule hereto, at such rate of interest not being less than — per cent. per annum, for such period, and generally on such terms as the said [*husband*] may require upon the security of the bond or covenant of the said [*husband*], either with or without any other security, as may be arranged between the said trustees or trustee and the said [*husband*]; PROVIDED ALWAYS that [the said trustees or trustee may, upon the request in writing of the said [*wife*] during her life, and after her death, if they shall all, if more than one, so think fit, but not otherwise, call in and compel payment of any sum or sums so advanced: AND that] the said trustees or trustee shall not in any case be answerable for any loss of any sum or sums of money so advanced as aforesaid, or any part thereof respectively, or of interest thereof: AND IT IS HEREBY AGREED AND DECLARED that the said trustees or trustee shall stand possessed of the sum or sums the repayment of which is intended to be so secured as lastly hereinbefore provided and the securities for the same and the investments thereof, and the interest and income thereof respectively, upon the like trusts and with and subject to the like powers and provisions as the sums or sum so advanced and the investment and the income thereof respectively, would have been subject to if no such advance or advances had been made: AND IT IS HEREBY AGREED AND DECLARED, that the said trustees or trustee shall stand possessed of the said stocks, funds, shares, and securities specified in the schedule hereto, and the investments for the time being representing the same (hereinafter called "the said trust fund") and the income thereof, UPON TRUST to pay the income thereof unto the said [*husband*] during his life; PROVIDED ALWAYS and it is hereby agreed that such life interest of the said [*husband*] in the said trust fund shall be

Proviso as to repayment of advances.

Indemnity clause.

Declaration of trusts of monies advanced to husband.

Trust of income for husband for life charged with maintenance of wife and children (*k*).

(*k*) This proviso is intended to secure some provision for the

XVI. Settlement on Marriage of Male Trader.

subject to and charged with the obligation of suitably and adequately providing out of the income of the said trust fund for the maintenance and support of the said [*wife*], and all and every the children, or child, of the said intended marriage so long as they shall respectively be under the age of twenty-one years and unmarried; AND IT IS HEREBY AGREED AND DECLARED, that from and after the death of the said [*husband*], the trustees or trustee shall pay the income of the said trust fund unto the said [*wife*], but so that she shall not have power to dispose of such reversionary life interest by way of anticipation; AND from and after the death of the survivor of them the said husband and wife shall, &c., [*continue trusts for issue as husband and wife shall jointly appoint, remainder as survivor shall appoint; in default of appointment for children equally; hotchpot clause, power of advancement*, pp. 546 *et seq.*; *ultimate trust for husband, ante*, p. 556]; PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee to apply any part of the said trust fund in or towards payment of calls on any shares for the time being forming part of the said trust fund: PROVIDED ALWAYS, and it is hereby agreed and declared that if the said [*wife*] shall survive the said [*husband*], and he shall by his will or any codicil thereto, so direct, the said trustees or trustee shall, notwithstanding the trusts hereinbefore declared, sell and dispose of so much of the trust fund hereby settled as shall be necessary, by the proceeds whereof to purchase a clear annuity not exceeding £—— for the life of the said [*wife*], and shall apply such proceeds in the purchase in the name and for the benefit of the said [*wife*], of an annuity of the amount so directed for her life, from Government, or any Assurance Society, or other incorporated Company empowered to grant life assurances, and the said wife shall be entitled to such annuity in addition to the income of the remainder of the said trust fund: [*Trustee clauses, ante*, p. 552.]

Trust of income for surviving wife for life.

Usual trusts in favour of issue, &c.

Power for trustees to apply trust funds in payment of calls on shares.

Power for husband to direct by will that an annuity shall be purchased for wife out of trust funds.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

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wife and children, notwithstanding that the husband's life interest may pass to his trustee in bankruptcy: see *Carr* v. *Living*, 28 Beav. 644; see also *Page* v. *Way*, 3 Beav. 20.

XVII. *SETTLEMENT, on* MARRIAGE, *of* STOCK IN TRADE, CREDITS, *and* FURNITURE *belonging to the intended Wife, for the Benefit of herself and her Children already born and to be born, with Provision for carrying on the Trade* (*l*).

Parties.

Assignment of stock in trade and personal estate;

after marriage, in trust as wife shall appoint; and, subject thereto, for her separate use, with power to carry on trade;

after her decease, for children at twenty-one, or marriage.

Power to invest and change securities.

THIS INDENTURE (*ll*), made the —— day of ——, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part; WITNESSETH, that, in consideration of the marriage intended shortly to be solemnized between the said [*husband*] and [*wife*], the said [*wife*] hereby assigns, and as settlor conveys unto the said [*trustees*], their executors, administrators, and assigns, ALL the property specified in the schedule hereto, and all other the stock in trade, debts, furniture, goods, chattels, and personal estate now belonging or owing to her; TO HOLD the said premises, IN TRUST for the said [*wife*] absolutely, until such marriage: AND thenceforth UPON SUCH TRUSTS as the said [*wife*] shall, notwithstanding coverture, by any deed or deeds or will appoint; AND, subject thereto, IN TRUST for the said [*wife*] during her life, for her separate use, and to allow her to carry on the said trade, and receive the profits thereof, and to manage, sell, order, and dispose of the said premises and the property which for the time being shall be engaged in the said trade, in all respects as if she were unmarried; AND after her decease, IN TRUST for such child or children of the said intended marriage as shall attain the age of twenty-one years, or marry under that age, if more than one, in equal shares; AND if there be no such child, IN TRUST for the said [*wife*], her executors, administrators, and assigns: PROVIDED that the said [*trustees*] or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents, (hereinafter called "the said trustees or trustee") shall, after the decease of the said [*wife*], dispose of and invest on any securities for the time being

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(*l*) As to the effect of a settlement of this kind, see *England* v. *Downs*, 6 Beav. 269. Such settlements are less common than formerly, owing to the provisions of the Married Women's Property Act, 1882, as to which see *ante*, pp. 132 *et seq.* See also *Ex parte Gilchrist*, 17 Q. B. D. 521.

(*ll*) Stamp, 1*l.*

XVII. Settlement on Marriage of Female Trader.

authorized by statute or order of Court for investment of trust funds, such parts of the said premises as shall not be already so invested; AND may from time to time, at their or his discretion, vary the investment of any part of the said premises; AND may raise and apply for the advancement in life or otherwise for the benefit of any child or children, any part of his, her, or their expectant or presumptive share or shares, not exceeding one half thereof (*m*): AND the said [*wife*] and [*husband*] respectively and irrevocably appoint the said trustees or trustee, and their or his substitutes or substitute, to be their, her and his attorneys and attorney, in their, her, or his names or name to sue and give receipts for all or any part of the said trust premises; AND the said [*husband*] hereby covenants with the said [*trustees*], That the said trust premises shall, after the said marriage, be at all times held and enjoyed according to the trusts hereof: AND shall, with all the personal estate to which the said [*wife*], during her said intended coverture shall be or become entitled, by devolution, gift, bequest, purchase, accumulation, or otherwise, be further and more effectually or satisfactorily assured unto or made recoverable by the said trustees or trustee, at the cost of the trust estate, by such acts, deeds, assurances, or authorities as the said trustees or trustee shall reasonably require and tender to be done, executed,

Advancement.

Power of attorney.

Covenant by husband for quiet enjoyment;

for further assurance of wife's present and future property.

(*m*) If desired the following power may be here inserted:—

"PROVIDED ALWAYS and it is hereby agreed, that it shall be lawful for the said [*wife*] by will or codicil to appoint that the income of the said trust premises or any part thereof shall be paid as from the time of her death to the said [*husband*] for his life or for any less period absolute or determinable; PROVIDED NEVERTHELESS that if the said [*wife*] shall leave any children or child her surviving, and the said [*husband*] shall at her death have done, committed, suffered or concurred in, or shall, after her death, during the existence of any such issue of the said wife, do, commit, suffer, or concur in any act, default, or thing, whereby any interest appointed to him would or might, wholly or partially, by process of law or otherwise, if absolutely belonging to him, become vested in or payable to, or be charged in favour of some other person or persons, then and in such case the life or other interest appointed to him shall either not take effect or shall cease and determine as the case may be."

Power for wife to appoint to husband life or other less interest terminable on bankruptcy.

XVII. Settlement on Marriage of Female Trader.

made, or given by the said [*wife*], and every person claiming under her; AND that the said [*wife*] may, during the said coverture, carry on the said trade in such house as the said [*husband*] shall for the time being reside in; and for that purpose may uninterruptedly use and occupy such room or rooms as she shall reasonably require: PROVIDED that the said trust premises shall be subject, in the first place, to indemnify the said [*husband*], his heirs, executors, administrators, and estates, against all liabilities, losses, and costs, incident to the said trade, or the execution of any trust or power herein contained: PROVIDED LASTLY that the statutory power of appointing a new trustee or new trustees of these presents when and so often as a vacancy shall occur shall be vested in the said [*wife*] during her life: [*Trustee clauses, ante*, p. 552]

that wife may occupy house.

Indemnity to husband.

Power to appoint trustees.

IN WITNESS, &c.,

THE SCHEDULE ABOVE REFERRED TO.

XVIII. *SETTLEMENT on* MARRIAGE *of a* WIDOW *under a* POWER *to* WITHDRAW PART *of the* TRUST FUNDS *contained in her former Marriage Settlement.*

THIS INDENTURE (*n*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., widow, of the second part; and [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS [*recite intended marriage, ante*, p. 544]; AND WHEREAS by an indenture dated, &c., and made between [*parties*] (being the settlement made in contemplation of the then intended marriage, which was shortly afterwards solemnized between the said [*wife*], then [*maiden name of wife*], spinster, and her late husband, [*name*], deceased), it was agreed and declared, among other things, that the trustees or trustee for the time being of the said indenture should, after the decease of such one of them the said [*former husband*] and [*wife*] as should first die, pay the income of the sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock, and of the investments for the time being representing

Parties.

Recitals: of intended marriage; of settlement on marriage of wife with her former husband;

(*n*) Stamp, 10*s.* in respect of the appointment, and *ad valorem* duty of 5*s.* per 100*l.* on the amount withdrawn and resettled.

XVIII. Settlement on Marriage of Widow under a Power in Original Settlement.

the same (therein called "the trust fund"), to the survivor of them during his or her life, and after the decease of such survivor should hold the trust fund and the income thereof in trust for such one or more of the children and remoter issue of the said then intended marriage as the said [*former husband*] and [*wife*] should jointly in manner therein mentioned appoint, and in default of and subject to any such appointment as the survivor of them should in manner therein mentioned appoint; And in default and subject to any such appointment, in trust for all the children or any the child of the said then intended marriage who, being sons or a son, should attain the age of twenty-one years, or being daughters or a daughter, should attain that age or marry, and, if more than one, in equal shares, with an ultimate trust in default of issue of the said then intended marriage for the said [*wife*] absolutely; And in the indenture now in recital was contained a power for the said [*wife*], if she should survive the said [*former husband*], at any time, &c. [*recite fully power for wife to withdraw funds from settlement in proportion to number of children of former marriage, see ante*, p. 550]; AND WHEREAS the said [*former husband*] died on the —— day of ——, leaving the said [*wife*] and two children by her, namely [*son*] and [*daughter*], both of whom are under the age of twenty-one years and unmarried, him surviving; AND WHEREAS the trust funds comprised in and settled by the said indenture of settlement consist of or are represented by the stocks, funds, shares, and securities following (*o*), that is to say [*describing them*]; AND WHEREAS [*deceased trustee*] died on the —— day of ——, 18—, and the said [*trustees*] are now the trustees of the hereinbefore-recited indenture of settlement; AND WHEREAS upon the treaty for the said now intended marriage it was agreed that the said [*wife*] should exercise her said power given to her by the said indenture of settlement, with the view of making such settlement as is hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said now intended marriage, it is hereby agreed and declared, and the said wife, in exercise of the said power in this behalf

of death of husband and state of family;

of state of trust funds;

of death of trustee of prior settlement;

of agreement for settlement.

Testatum.

Agreement, and appointment by wife;

(*o*) *Or*,
"The stocks, funds, shares, and securities specified in the schedule hereunder written."

XVIII. **Settlement on Marriage of Widow under a Power in Original Settlement.**

given to or vested in her by or by virtue of the hereinbefore-recited indenture of settlement, and of all other powers and authorities (if any) her hereunto enabling, irrevocably directs and appoints as follows, that is to say:—That the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the said indenture of settlement (hereinafter called "the said trustees or trustee"), shall pay the income of all the trust funds comprised in and settled by the same indenture to the said [*wife*] during her life, pursuant to the trust in that behalf declared and contained in the said indenture, for her separate use without power of anticipation; And from and after the death of the said [*wife*] shall stand possessed of one moiety or equal half-part of the said trust funds, Upon trust to pay the income thereof to the said [*husband*] during his life; And from and after the death of the survivor of them, the said [*husband*] and [*wife*] shall stand possessed of the said half-part of the said trust funds and the income thereof, In trust for, &c., [*issue of the* "now intended marriage" *as husband and wife or the survivor shall appoint; and in default of appointment for children of* "now intended marriage" *equally at twenty-one or marriage; hotchpot clause, ante*, p. 546]: And it is hereby further agreed and declared, and the said [*wife*] in exercise of the power and powers aforesaid further irrevocably appoints, that if either of the said two children of the said [*wife*] by the said [*former husband*] shall die, being the said [*son*] under the age of twenty-one years, or being the said [*daughter*] under that age and without having been married [without such consent as aforesaid], then and in such case, from and after the death of the said [*wife*], or the death of such child, whichever event shall last happen, the said trustees or trustee shall stand possessed of one other equal sixth-part of the said trust funds, making, together with the said half-part thereof hereinbefore expressed to be hereby appointed, and made subject to the trusts, powers, and provisions hereinbefore declared and contained concerning the same, two equal third-parts of the same trust funds, upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the said half-part of the said trust funds, or such of them as shall be then subsisting and capable of taking effect: Provided always, and it is hereby agreed and declared, that if neither of the said two child-

that trustees shall pay income of all the trust funds to wife;

and shall pay income of half the trust funds to husband surviving;

trusts of half the trust funds for issue of second marriage.

Appointment that if either of children of first marriage shall die under age, &c., a further part of trust funds shall be subject to trusts of present settlement.

Declaration that if both

XVIII. **Settlement on Marriage of Widow under a Power in Original Settlement.**

ren of the said [*wife*] by the said [*former husband*], being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry [with such consent as aforesaid], and if no issue of either of the said children shall become absolutely entitled to any share or interest in the residue of the said trust funds not hereby appointed, nor made subject to the trusts powers and provisions of these presents, under the trusts and powers declared and contained in the hereinbefore recited indenture of settlement, then, and in such case, from and after the death of the said [*wife*], or the failure of such children or issue as last aforesaid (whichever event shall last happen), the said trustees or trustee shall stand possessed of such residue of the said trust funds, upon the trusts, and with and subject to the powers and provisions hereinbefore declared and contained concerning the said half-part of the said trust funds hereinbefore expressed to be hereby appointed and agreed to be settled, or such of them as shall then be subsisting and capable of taking effect: PROVIDED ALWAYS, &c. [*Power of advancement for benefit of the children of the* "now intended marriage," *ante*, p. 547]; AND it is hereby agreed that if there shall be no child of the said [*wife*] by the said [*former husband*], or of the said now intended marriage, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry [with such consent as aforesaid], then, subject to the trusts and powers declared and contained in the hereinbefore recited indenture of settlement and these presents respectively, the said trustees or trustee shall stand possessed of the entirety of the said trust funds and the income thereof upon the trusts following, that is to say, IN TRUST, &c. [*Trusts in favour of wife, ante*, p. 548]: PROVIDED ALWAYS, and it is hereby agreed and declared, that nothing herein contained shall prejudice or affect any power of appointment, or of consenting to the exercise of powers, or any other power by the hereinbefore recited indenture of settlement given to or vested in the said wife (as having survived the said [*former husband*]), in favour of her children and remoter issue by him as regards the said residue of the said trust funds not hereby appointed and made subject to the trusts, powers, and provisions of these presents, but that such power shall remain in force and be exerciseable by the said [*wife*] notwithstanding her now intended coverture.

children of prior marriage shall die under age, &c., all the trust funds shall be subject to present settlement.

Advancement.

Trusts, in default of issue of either marriage, in favour of wife.

Proviso that wife's powers of appointment as to unappointed residue of trust funds shall continue to be exerciseable.

IN WITNESS, &c.

XIX. *DECLARATION OF TRUST on* MARRIAGE *of a* WIDOW *of* TRUST FUNDS *settled on her* FORMER MARRIAGE, *for the Purpose of* RESTRAINING ALIENATION *during the* INTENDED COVERTURE (*p*).

Parties.

THIS INDENTURE (*q*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the one part; and the [*intended wife*], of, &c., widow, of the other part:

Recitals: of former settlement;

WHEREAS [*recite settlement on the former marriage of the intended wife settling certain funds in trust for the wife if she should survive her former husband for her life, without power of anticipation during the former coverture*]:

of death of former husband;

AND WHEREAS the said [*former husband*] died on the —— day of ——, 18—, leaving the said [*wife*] his widow him surviving;

of intended marriage;

AND WHEREAS a marriage is intended to be shortly solemnized between the said [*husband*] and [*wife*];

of agreement for this settlement.

AND WHEREAS upon the treaty for the now intended marriage it was agreed that the life interest of the said [*wife*] in the trust funds comprised in the hereinbefore recited indenture should be made subject to a restraint on anticipation in manner hereinafter appearing:

Testatum. Declaration of trusts of income for wife without power of anticipation during intended coverture, and, subject thereto, upon trusts of original settlement.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the said now intended marriage, it is hereby agreed and declared and the said [*wife*] hereby with the consent and privity of the said [*husband*], testified by his execution of these presents, directs and declares that the trustees or trustee for the time being of the hereinbefore recited indenture of settlement shall stand possessed of the dividends, interest, and income to which the said [*wife*] is so entitled as aforesaid under or by virtue of the same indenture, UPON TRUST from and after the solemnization of the said now intended marriage and thenceforth during the joint lives of the said [*husband*] and [*wife*] to pay

(*p*) This Precedent is taken from the 1st Ed. of this Work, Vol. IX., p. 362, and may be readily adapted to the case of the marriage of a spinster entitled under a settlement or will to an annuity or other life interest only. Cases may not unfrequently arise, when a woman about to marry may be well advised to protect her life interest by imposing on herself a restraint against alienation. Notice of the restraint should be given to the trustees of the settlement or will under which the interest is derived. If the fund producing the income is in Court, a stop order should be obtained directing payment thereof to the wife only on her separate receipt, during the joint lives of herself and her husband.

(*q*) Stamp, 10*s*.

XIX. Declaration by Widow to restrain alienation of her Life-interest under former Settlement.

the said dividends, interest, and income to the said [*wife*] for her separate use, but so that she shall not have power to dispose of or charge the same by way of anticipation; And to stand possessed of the same dividends, interest, and income as well before the commencement as after the determination of the trust hereinbefore contained, and subject thereto, upon the same trusts as are in the hereinbefore recited indenture of settlement declared and contained concerning the same, or upon such of the same trusts as are now subsisting and capable of taking effect: PROVIDED ALWAYS, &c. [*proviso that* "as regards the trust funds for the time being subject to the hereinbefore recited indenture of settlement," *powers shall continue to be exerciseable, ante*, p. 625].

IN WITNESS, &c.

XX. *SETTLEMENT on* MARRIAGE *of a* SUM *of Money belonging to the* HUSBAND, *and of* STOCKS, *&c., belonging to the Wife. The First* LIFE INTEREST *in the* HUSBAND'S FUND *is given to the* WIFE; *and the First* LIFE INTEREST (*terminable on* BANKRUPTCY, *&c.*), *in the* WIFE'S FUND *is given to the* HUSBAND (*r*). COVENANT *by the* HUSBAND *for* PAYMENTS *to the Trustees of certain* SUMS *in respect of any* AFTER-ACQUIRED PROPERTY *derived from a particular Source* (*s*).

THIS INDENTURE (*t*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: Parties.

(*r*) This arrangement is intended to afford the most absolute security possible against the husband's creditors without putting him from the first entirely in the hands of the wife or of the trustees. A man cannot settle his own property, except to the extent of any property of his wife received by him on the marriage, so as to render his life interest defeasible on bankruptcy: see *ante*, p. 285.

(*s*) As to covenants to settle after-acquired property of the husband, see *ante*, p. 320.

(*t*) Stamp, 5*s.* per 100*l.*, or part of 100*l.*, of the amounts or value of the respective funds brought into settlement; and 10*s.* in respect of the husband's covenant for payment of contingent sums. If any such sums should be paid a memorandum of each payment

XX. **Settlement of Property belonging partly to Husband partly to Wife, where each takes first Life-interest in the Other's property. Covenant by Husband to Settle after-acquired Property.**

Recitals:
of intended marriage;
of payment of sum by husband;
of title to wife to stocks, &c.;
of agreement for settlement;
for settlement of wife's after-acquired property;
and that husband should covenant to pay to trustees certain sums in respect of property to be acquired by him.

Testatum.

Declaration of trusts of funds brought into settlement.

Trust for investment of husband's trust fund.

WHEREAS [*recite intended marriage, ante*, p. 544; AND WHEREAS the said [*husband*] is entitled to a sum of 5000*l.*, which he has this day paid unto the said [*trustees*] (the receipt of which sum the said [*trustees*] hereby acknowledge) to be held by them, UPON TRUST for the said [*husband*] until the said intended marriage, and thereafter upon the trusts, and with, and subject to the powers and provisions hereinafter declared concerning the same; AND WHEREAS the said [*wife*] is entitled to the several stocks, funds, shares, and securities, the particulars whereof are specified in the schedule hereunder written; AND WHEREAS upon the treaty for the said intended marriage it was agreed that the same stocks, funds, shares, and securities should, immediately after the said intended marriage, be assigned, transferred, or delivered unto the said [*trustees*] to be held by them upon the trusts, and with, and subject to the powers and provisions hereinafter declared concerning the same; AND it was further agreed that these presents should contain the covenant or agreement hereinafter contained for settling any property real or personal, except as hereinafter mentioned, of or to which the said [*wife*] is, or may become possessed or entitled at the time of the said intended marriage, or during the now intended coverture; AND also that the said [*husband*] should enter into the covenant on his part hereinafter contained for the payment by him, and settlement in manner hereinafter appearing, of further monies, in the events or contingencies hereinafter specified: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the said intended marriage, it is hereby agreed and declared that the said [*trustees*] shall, from and after the said intended marriage, stand possessed of the said sum of 5000*l.* hereinbefore recited to have been paid to them as aforesaid, and also of the several stocks, funds, shares, and securities specified in the said schedule hereunder written, UPON TRUST that the said [*trustees*] and the survivors and survivor of them, and the executors or administrators of such survivor or other the trustees or trustee for the time being (hereinafter called "the said trustees or trustee") shall, as to the said sum of 5000*l.*, forthwith, or as soon as may be, with

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should be endorsed on the settlement (see Precedent XXVII, *post*, p. 655), and *ad valorem* duty will be payable on the amount then paid to the trustees pursuant to the covenant.

XX. Settlement of Property belonging partly to Husband partly to Wife, where each takes first Life-interest in the Other's Property. Covenant by Husband to Settle after-acquired Property.

the consent of the said [*husband*] and [*wife*] during their joint lives, and of the survivor during his or her life, and, after the death of such survivor, at the discretion of the said trustees or trustee, invest the same in their or his names or name, &c. [*Investment Clause, ante*, pp. 545, 554, 558, *or* 562; *power to vary investments, ante*, p. 545]; AND shall, as to the several stocks, funds, shares, and securities specified in the said schedule hereunder written, either allow the same respectively or any part thereof to remain in the actual state of investment thereof respectively, or may, with the consents or at the discretion hereinbefore mentioned, as the case may be, sell and convert into money the same stocks, funds, shares, and securities, or any of them, or any part thereof respectively, and invest the net proceeds of such sale in or upon any of the stocks, funds, shares, or securities hereinbefore authorised for investment of, and in like manner as is hereinbefore mentioned with regard to the said sum of 5000*l.*, with the like power to vary investments; AND shall stand possessed of the said sum of 5000*l.*, and the investments for the time being representing the same (hereinafter called the husband's trust fund) and the income thereof, And also of the several stocks, funds, shares, and securities specified in the said schedule hereunder written, and the investments for the time being representing the same respectively (hereinafter called the wife's trust fund), and the income thereof respectively, UPON THE TRUSTS and with, under and subject to the powers and provisions hereinafter contained concerning the same trust funds respectively, that is to say, UPON TRUST that the said trustees or trustee shall, as to the said husband's trust fund, pay the income thereof to the said [*wife*] during her life for her separate use, but so that she shall have no power to anticipate the same; AND from and after her death if the said [*husband*] shall survive her [and shall not have assigned or charged or purported or attempted to assign or charge the income of the said husband's trust fund or any part thereof], shall pay the income of the same trust fund to the said [*husband*] during his life [or until he shall assign or charge, or purport or attempt to assign or charge such income or some part thereof] (*u*); AND after the death

Trust for investment of wife's trust fund.

Trusts of income of husband's trust fund; for wife for life; remainder for husband for life or (if desired) until alienation.

(*u*) The words in brackets in this clause may be inserted if desired, as a husband may restrain himself from *alienation* of his life-interest in property settled by himself: see *ante*, p. 285.

XX. **Settlement of Property belonging partly to Husband partly to Wife, where each takes First Life-interest in the Other's Property. Covenant by Husband to Settle after-acquired Property.**

of the said [*wife*], and failure or determination during the life of the said [*husband*] of the trust hereinbefore declared of the said income in his favour, shall during the remainder of his life pay or apply the income of the said husband's trust fund to the persons or person, upon the trusts, or for the purposes, to, or upon, or for which the same would for the time being be payable or applicable, if the said husband were then dead; AND shall, as to the said wife's trust fund, pay the income thereof to the said [*husband*] during his life or until he shall become bankrupt, or shall assign or charge, or purport to attempt, assign, or charge the same income, or some part thereof, or until some other event shall happen whereby, or by reason whereof the same income or any part thereof, if belonging absolutely to him, would become vested in or payable to some other persons or person: AND shall, after the determination during the life of the said [*husband*] of the trust hereinbefore declared in his favour of the income of the said wife's trust fund, shall, in the exercise of the absolute and uncontrolled discretion of them or him the said trustees or trustee, from time to time, either permit the income of the said wife's trust fund to go over and be applied under the ulterior trusts, powers, and provisions hereinafter declared and contained concerning the same, or shall apply the same income wholly or partially during the remainder of the life of the said husband for his benefit in such manner as the said trustees or trustee shall think proper; AND from and after the death of the said [*husband*] shall pay the income to the said [*wife*], if she shall survive him, but so that she shall not during the said intended coverture have power to dispose of, or charge such reversionary interest by way of anticipation: AND from and after the death of the survivor of the said [*husband*] and [*wife*] shall stand possessed of the said husband's trust fund, and the said wife's trust fund, and the income thereof respectively, IN TRUST, &c. [*Trusts for issue as wife or husband and survivor shall appoint: in default of appointment for children of marriage; hotchpot clause; power of advancement, ante*, pp. 546 *et seq.*; *ultimate trusts of husband's trust fund and wife's trust fund respectively, ante*, p. 586; *covenant to settle wife's after-acquired property, ante*, p. 548]: AND THIS INDENTURE ALSO

Trust of income after alienation.

Trusts of income of wife's trust fund;

for husband till bankruptcy, &c.

Discretionary trust for application of income after husband's bankruptcy, &c. (short form (*x*));

remainder for wife for life.

Trusts of both funds for issue of marriage.

Second *testatum*.

(*x*) For a fuller form of such discretionary trust, see *ante*, p. 576.

XX. Settlement of Property belonging partly to Husband partly to Wife, where each takes First Life-interest in the Other's Property. Covenant by Husband to Settle after-acquired Property.

WITNESSETH that, in pursuance of the said agreement in this behalf, and for the consideration aforesaid, the said [*husband*] hereby covenants with the said [*trustees*] that if the said marriage shall be solemnized, and if he now is or shall at any time or times during the said intended coverture become beneficially entitled under the wills of his aunts [*names*] or the will of either of them, or any codicils or codicil thereto respectively, or under the intestacies or intestacy of them, or either of them, or by any voluntary gift from them, or either of them, to the corpus or principal of any property real or personal belonging to, or derived from or through the said [*aunts*], or either of them which, during the said intended coverture, shall be, or fall into absolute present possession, and which shall at any one time amount or be equal in value to the sum of 5000*l.* or upwards, then and in such case, and so often as it shall from time to time so happen, he the said [*husband*] will forthwith, on becoming so entitled in possession, pay to the said trustees or trustee the several sums following, that is to say, if the amount of the property in question shall be 5000*l.* or more but less than 10,000*l.* the sum of 2500*l.*, and if the amount or value shall be 10,000*l.* or more then the sum of 3750*l.*, together with 1250*l.* more for every entire sum of 5000*l.* of the amount or value of such property over and above the sum of 10,000*l.*: AND FURTHER, that the sums or sum so to become payable to the said trustees or trustee shall carry interest at the rate of 4 per cent. per annum from the time when the same shall become payable until actual payment: AND IT IS HEREBY AGREED and declared that all sums, if any, which shall become payable under the covenant of the said [*husband*] hereinbefore contained shall be held by the said trustees or trustee upon the same trusts, and subject to the same powers and provisions, as are herein declared and contained concerning the said husband's trust fund, and the income thereof, [save and except that after the death of the said [*wife*] the income of the monies hereinbefore covenanted to be paid, or of the stocks, funds, shares, or securities for the time being representing the same shall be paid to the said [*husband*] if he shall survive her during his life absolutely] (*y*): PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall not be answerable or accountable

Covenant by husband for payment and settlement of certain sums in the event of his becoming entitled to property from certain specified sources.

Declaration of trusts of sums paid by husband.

Proviso that trustees may forbear enforcing

(*y*) These words have reference to the words in brackets, *ante*, p. 629, and may be retained or omitted as desired.

XX. Settlement of Property belonging partly to Husband partly to Wife, where each takes First Life-interest in the Other's Property. Covenant by Husband to Settle after-acquired Property.

for neglecting, omitting, or delaying to enforce the covenant on the part of the said [*husband*] hereinbefore contained, unless the said trustees or trustee shall wilfully and without reasonable cause persist in such neglect, omission, or delay, after being required by, or on behalf of some person beneficially interested under this settlement to enforce such covenant; And further, that it shall be lawful for the said trustees or trustee to ascertain or determine for themselves or himself, and by such means as they or he shall think fit, the amount or value of any property to which the said husband may at any time or from time to time become entitled as aforesaid; And the value so ascertained and determined by the said trustees or trustee, and certified by them or him in writing, shall, if assented to by the said [*husband*], bind and conclude all persons beneficially interested under this settlement, but the same shall not bind or conclude the said [*husband*] or his representatives if he or they shall dispute, or dissent from the amount or value so determined and certified, without having previously accepted, assented to, or acted upon the same as correct [*Power to appoint new trustees, ante*, pp. 552, or 590; *trustee clauses, ante*, p. 552].

payment of covenant to pay sums.

Power for trustees to determine questions as to value of property acquired by husband.

In witness, &c.

The Schedule above referred to.

XXI. *ARTICLES for a* Marriage Settlement *of Personal Property belonging to the intended Husband and Wife respectively* (*z*).

AN AGREEMENT (*a*), made the —— day of ——, 18—, Between [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: Whereas [*recite intended marriage, ut ante*, p. 544]; And whereas the said [*husband*] is absolutely entitled to the several stocks, funds, and securities following [*describing them*]; And whereas the said [*wife*] is under or by virtue of a settlement executed in or about the year 18—, on the marriage of her father and mother, both since deceased, to one equal —— share of

Parties.

Recitals: of intended marriage; of title of husband to stocks, &c.; of title of wife to share of trust funds

(*z*) As to the preparation of marriage articles, see *ante*, pp. 195 *et seq.*

(*a*) Stamp, 5*s.* per 100*l.*, or part of 100*l.*, on the amount agreed to be settled.

the trust funds thereby settled, which share is represented by certain monies, stocks, funds, and securities standing in the names of or vested in the present trustees of the said settlement, and is estimated to be of the value of £—— or thereabouts; AND she may be or become entitled to property derived from other sources: NOW THESE PRESENTS WITNESS, and, in consideration of the said intended marriage, it is hereby agreed and declared as follows, that is to say:—

comprised in prior settlement.

Testatum.

Agreement for settlement;

1. WITHIN —— calendar months from the date of these presents, if the said intended marriage shall then have taken place, the said [*husband*] shall transfer to the said [*trustees*] the stocks, funds, and securities to which he is so absolutely entitled as aforesaid, (which and the investments thereof are hereinafter called "the husband's trust fund") to be held by them upon the trusts hereinafter expressed concerning the same.

that husband shall transfer stock, &c., to trustees;

2. WITHIN the same period, if the said intended marriage shall then have taken place, the said [*wife*] shall assign or transfer or cause to be assigned or transferred all that said ——th share, and all other share or shares to which she shall then be or become entitled of and in the property comprised in the said indenture of settlement or the investments representing the same respectively to the said trustees, (all which trust premises and the investment thereof are hereinafter called "the wife's trust fund"), to be held by them upon the trusts hereinafter expressed concerning the same.

that wife shall cause her share to be transferred to trustees;

3. WITHIN the same period, or as soon as conveniently may be afterwards, if the said intended marriage shall then have taken place, a settlement of all the property and premises hereinbefore agreed to be transferred and assigned to or vested in the said [*trustees*] by the said [*husband*] and [*wife*] respectively, shall be prepared by the said [*trustees*] or other the trustees for the time being hereof (hereinafter called "the said trustees") in accordance with the provisions of these presents.

that trustees shall cause a settlement to be prepared;

4. THE settlement so to be prepared as aforesaid shall contain the trusts and powers and provisions following, that is to say: A trust to get in and receive all such parts of the said trust premises as shall not have been assigned or transferred unto or received by the said trustees, and to invest in or upon such stocks, funds, shares or securities as shall hereafter be agreed upon between the parties hereto all such parts of the same as shall not be so invested (*aa*), with power for the said

As to contents of intended settlement;

(*aa*) It will be better, if possible, to agree as to the investments

XXI. Marriage Articles for Settlement of Personalty.

trustees to vary such investments, but so that no investment or variation of investments shall be made during the joint lives of the said [*husband*] and [*wife*] or the survivor of them, except with her or his consent in writing: And also further trusts to pay the income of the husband's trust fund to the said [*husband*] during his life, And the income of the wife's trust fund to the said [*wife*] for her life, And after the decease of such one of them the said [*husband*] and [*wife*] as shall first die, to pay the income of both trust funds to the survivor, And after the death of such to hold the capital and income of both trust funds, Upon trust for the children or remoter issue of the said intended marriage in such shares and in manner in all respects as the said [*husband*] and [*wife*] shall jointly by deed appoint; And subject thereto as the survivor of them shall by deed or will appoint; And subject thereto In trust for the children or child of the said intended marriage being sons or a son at twenty-one, or being daughters or a daughter at that age or on marriage, if more than one, in equal shares; And subject to the foregoing trust as to the husband's trust fund, In trust for the [*husband*] absolutely, and as to the wife's trust fund, In trust for such persons and purposes as the said [*wife*] shall by will, or while not under coverture, by deed or will appoint, and, in default of such appointment if the said [*wife*] shall survive the said [*husband*], for her absolutely, but if the said [*husband*] shall survive the said [*wife*], for her next of kin as if she had died intestate and without ever having been married. The said settlement shall contain all such clauses with respect to maintenance, education, advancement, hotchpot and other clauses as shall be thought advisable or expedient, and also a covenant or agreement for the settlement of all other or after-acquired property of or to which the said [*wife*] may be or become entitled during the said intended coverture.

that husband and wife shall execute settlement, and for further assurance;

5. The said [*husband*] and [*wife*] and the respective heirs, executors, and administrators, and all other necessary parties, if any, shall, when required by the said trustees, execute the said settlement, and also execute and do all such conveyances, transfers, instruments, acts, and things as may be necessary for the carrying into effect of the said settlement.

that until execution of settlement,

6. From and after the said marriage and until the said settlement, conveyances, transfers, instruments, acts, and

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to be permitted before the articles are made, and to insert in this place a full investment-clause; for forms of such clauses, see *ante*, pp. 545, 554, 558 and 562.

XXI. Marriage Articles for Settlement of Personalty.

things shall have been executed and done, the property hereby agreed to be settled shall be held by the persons in whom the same is vested respectively and their respective heirs, executors, administrators, and assigns, upon the trusts and subject to the powers and provisions hereinbefore expressed concerning the same.

&c., property shall be held upon trusts expressed in this agreement;

7. The said [*trustees*] shall be the trustees of the said settlement; but in case of a vacancy occurring either before or after the execution of the said settlement, the statutory power of nominating new trustees shall be vested in the said [*husband*] and [*wife*] during their joint lives, and the survivor of them during his or her life.

as to trustees of the settlement, and filling up vacancies;

8. The costs of and incident to the negotiation, preparation, engrossment, and execution of these presents and of the said settlement, and of all such conveyance, transfers, instruments, acts, and things as aforesaid, shall be paid by the said [*husband*] [*or* out of the said husband's trust fund and wife's trust funds in equal shares].

as to expenses of settlement, &c.;

9. In case of any dispute or difference between the parties hereto, as to the trusts, powers, or provisions proper to be inserted in the said settlement, so as to carry into effect the stipulations hereinbefore contained, or as to the true intent and meaning of these presents, or as to any matter or thing whatsoever relating to the said settlement, and these presents respectively, shall be referred to a conveyancing counsel of not less than —— years' standing, whose opinion shall be final and conclusive.

as to determination of differences as to construction and effect of this agreement.

As witness, &c.

XXII. *POST-NUPTIAL SETTLEMENT (pursuant to* Articles *entered into on a* Marriage *between an* Englishwoman *and a* Foreigner(*b*)) *of* Personalty *belonging partly to the* Husband *and partly to the* Wife. Nomination *of* New Trustees. Declaration *that the* Settlement *shall be construed and administered according to the* Law *of* England.

THIS INDENTURE (*c*), made the —— day of ——, 18—, Between [*husband*], of, &c., of the first part; [*wife*], his

Parties.

(*b*) As to settlements made on marriages with foreigners, see *ante*, pp. 161 *et seq.*

(*c*) Stamp, 10*s.*, see *ante*, p. 541.

XXII. **Post-nuptial Settlement pursuant to Articles.**

wife, formerly [*maiden name*] spinster, of the second part; and [*trustee No.* 1], of, &c., [*trustee No.* 2], of, &c., and [*trustee No.* 3] of the third part: WHEREAS by articles of agreement dated the —— day of ——, 18—, and made between the said [*husband*] of the first, the said [*wife*] by her then name of [*maiden name*] of the second part, and the said [*trustee No.* 1] and [*other original trustees*] of the third part (being articles entered into in consideration of the then intended marriage, which was shortly afterwards solemnized between the said [*husband*] and [*wife*] his wife), it was, among other things, agreed and declared that within six months from the date thereof, if the said intended marriage should then have taken place, certain monies, stocks, funds, shares, and securities therein respectively mentioned and therein and hereinafter referred to as the "husband's trust fund" and "the wife's trust fund" respectively, should be transferred to the said [*original trustees*], to be held by them upon the trusts thereinafter declared concerning the same; AND it was also thereby agreed that within the same period or as conveniently might be afterwards, if the said intended marriage should then have taken place, a settlement of the said trust funds should be prepared by the trustees for the time being of the said articles in accordance with the provisions of the same articles: and should be executed by the said [*husband*] and [*wife*] and all other necessary parties; AND it was thereby further agreed that the settlement so to be prepared and executed as aforesaid, should contain the trusts, powers, and provisions following, that is to say, a trust, &c. [*the trusts should be set out as fully as may be necessary under the circumstances, e.g. as in Precedent XXI., art.* 4, *ante*, p. 633, *mutatis mutandis, or as the case may require, and continue*]; AND it was thereby further agreed that the said [*original trustees*] should be the trustees of the said settlement, but that in case a vacancy should occur either before or after the execution of the said settlement, the statutory power of nominating new trustees should be vested in the said [*husband*] and [*wife*] during their joint lives: AND WHEREAS the said [*original trustee*] died on the —— day of ——, 18—, And the said [*other original trustee*] refuses to act in the trusts of these presents, and the said [*husband*] and [*wife*] are desirous of nominating the said [*trustee No.* 2] and [*trustee No.* 3] in the place of the said [*original trustees*] so deceased, and refusing to act as aforesaid

Recitals: of marriage articles;

of death and retirement of original trustees and desire to appoint new trustees;

XXII. Post-nuptial Settlement pursuant to Articles.

respectively, to be the trustees of these presents, being the settlement which has been prepared pursuant to the said articles for the purpose of expressing and carrying into effect the provisions thereof: AND WHEREAS all the trust property and premises agreed to be settled by the said articles has some time since been paid or transferred to, or otherwise got in and received by the trustees of the said articles, and have been duly invested by them pursuant to the provisions therein contained, and the several parts of the said trust premises, representing the husband's trust fund and the wife's trust fund respectively have become blended, and the same trust premises are now represented by the several stocks, funds, shares, and securities, the particulars whereof are specified in the schedule hereunder written; AND WHEREAS it is the intention of the parties hereto that these presents shall be construed, and that the rights of all persons claiming under or by virtue of these presents shall be regulated by the law of England, in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that the said [*husband*] and [*wife*], for the purpose of effectuating their said desire, do hereby, in exercise of the power in that behalf given to them by the said articles, and of every other power them hereunto enabling, nominate and appoint the said [*trustees Nos.* 2 *and* 3] to be trustees in the place of the said [*deceased and retiring trustees*] respectively, and to act jointly with the said [*continuing trustee*] for all the purposes of these presents; AND THIS INDENTURE ALSO WITNESSETH that, pursuant to the trusts and provisions expressed and contained by and in the said articles, it is hereby agreed and declared that the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee"), shall stand possessed of the several stocks, funds, shares, and securities specified in the said schedule hereunder written, UPON TRUST that the said trustees or trustee shall either allow the same several stocks, funds, shares, and securities, or any of them or any part thereof respectively, to remain in their actual state of investment, or may, with the consent in writing of the said [*husband*] and [*wife*] during their joint lives, or of the survivor of them during his or her life, and after the decease of such survivor, at the discretion of the said trustees or trustee, sell and convert into money all or any of the same stocks, funds, shares,

of transfer of trust funds and investment thereof;

of intention that the settlement shall be regulated by English law.

First *testatum.*

Appointment of new trustees.

Second *testatum.*

Declaration of trusts:

trust for investment;

XXII. Post-nuptial Settlement pursuant to Articles.

and securities, and invest the net proceeds of any such sale in their or his names or name, &c. [*investment Clause, ante*, pp. 545, 554, 558, *or* 562; *power to vary investments, ante*, p. 545]; AND shall stand possessed of the said stocks, funds, shares, and securities specified in the said schedule hereunder written, and the investments for the time being representing the same respectively (hereinafter collectively called "the said trust funds"), and the income thereof respectively, UPON THE TRUSTS and with, under, and subject to the powers and provisions hereinafter declared concerning the same, that is to say, UPON TRUST, &c. [*trusts of income of husband's trust fund and wife's trust fund respectively, ante*, p. 585; *trust of capital and income of the whole of the trust funds for issue of the marriage as the husband and wife shall jointly by deed appoint; in default of such appointment as the survivor shall by deed or will appoint, ante*, p. 546; *and add*], PROVIDED ALWAYS that any such appointment as last aforesaid shall be valid and effectual, if made by any will or codicil, or by any instrument being, or purporting to be of the nature of a will or codicil, made and executed either so as to be valid, according to the law of the domicil of such survivor, or so as that the same would have been valid according to the law of England, if such survivor were at the time of his or her death domiciled in England, and that any such appointment by the said [*wife*] shall be valid notwithstanding any coverture [*trusts in default of appointment for children of intended marriage; hotchpot and advancement clause, ante*, p. 547]; AND IT IS HEREBY AGREED and declared that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry [with such consent as aforesaid], then, subject to the trusts and powers hereinbefore declared and contained, or by law vested in the said trustees or trustee, the said trustees or trustee shall stand possessed of the said trust funds and the income thereof, AS TO the husband's trust fund, IN TRUST for the said [*husband*] absolutely; AND, AS TO the wife's trust fund, IN TRUST for such persons or person and for such purposes as the said [*wife*] shall, while discovert, by deed, revocable or irrevocable, or, whether covert or discovert, by will or codicil or instrument being or purporting to be of the nature of a will or codicil, made and executed as aforesaid, appoint: AND in default and subject to any such appointment, if, &c. [*continue trusts in favour of wife and*

Usual trusts for wife, husband, and issue of marriage.

Proviso as to validity of appointments by will.

Trusts for children in default of appointment.

Ultimate trusts in default of issue, in favour of wife.

her next of kin, ut ante, p. 548; *covenant to settle after-acquired property, ante*, p. 549; *power for trustees to apportion blended trust funds, ante*, p. 579; *power to appoint new trustees and trustee clauses, ante*, p. 552]: PROVIDED LASTLY, and it is hereby agreed and declared by and between the parties hereto, and particularly by the said [*husband*], that these presents shall be construed and the trusts, powers, and provisions herein declared and contained shall be administered, exercised, and carried into effect according to, and that the rights of all parties claiming under or by virtue of these presents shall be regulated in like manner in all respects as if the said [*husband*] and [*wife*] had been at the time of their marriage, and were now, and intended henceforth, during their respective lives, to continue and be domiciled in England.

XXII. Post-nuptial Settlement pursuant to Articles.

Proviso that the settlement shall be regulated by English law.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XXIII. *POST-NUPTIAL SETTLEMENT of* STOCK *in the* FUNDS *and a* MORTGAGE DEBT (*transferred by a separate Deed*), IN TRUST *for the* SETTLOR'S WIFE, *during her* LIFE, *and after her Death for the* SETTLOR *during his* LIFE; *and after the Death of the Survivor, for* CHILDREN (*all daughters*), *in aliquot Shares, for their separate and inalienable Use for Life, with an ulterior Trust for their respective Children, or more remote Issue* (*d*).

THIS INDENTURE (*e*), made the —— day of ——, 18—, BETWEEN [*settlor*], of, &c., of the one part, and [*trustee*], of, Parties.

(*d*) This post-nuptial settlement, not being made in pursuance of marriage articles is of course voluntary, and is liable to be defeated if the settlor becomes bankrupt within two years after the date thereof, or within ten years after that date, unless the solvency of the settlor at that date can be proved: see *ante*, p. 181. It will also, if fraudulent, be void against his creditors under the stat. 13 Eliz. c. 5, *ante*, p. 176. The Precedent in the text (which is adapted from the 1st Ed. of this Work, Vol. IX., p. 508), illustrates the manner of framing trusts by way of reference, which is seldom required in marriage settlements where the settled property, instead of being (as here) disposed of among certain designated objects and their issue, is given simply and absolutely to the children of the intended marriage. The present

(*e*) For note (*e*) see next page.

XXIII. **Post-nuptial Settlement of Stock and Mortgage Debt.**

&c., and [*trustee*], of, &c., of the other part: WHEREAS the said [*settlor*], in consideration of his natural love and affection for [*wife*] and his children, is desirous of making for them respectively a provision in manner hereinafter appearing; AND WHEREAS, for effectuating such desire the said [*settlor*] has this day transferred into the names of the said [*trustees*] the sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock belonging to him; AND has also by deed of even date herewith, and made between the same persons as are parties hereto, transferred to the said [*trustees*], their heirs, executors, administrators, and assigns respectively, a certain mortgage, whereby the sum of £—— and interest are secured to the said [*settlor*], his executors, administrators, and assigns, to the intent that all the premises so transferred as aforesaid may be held upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same respectively: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared, that the said [*trustees*], and the survivors or survivor of them, and the executors or administrators of such survivor, and other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee"), shall stand possessed of the said sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock and of the said mortgage debt of £——, and the securities for the same, [UPON SUCH TRUSTS as the said [*settlor*] shall at any time or times by deed, will, or codicil appoint (*f*); AND subject thereto], UPON TRUST that the said trustees or trustee shall pay the income from the said trust premises unto the said [*wife*], or her assigns during her life; AND after her decease, shall pay the said income to the said

Recital of transfer of stock and of mortgage.

Testatum.

Declaration of trusts;

as settlor shall appoint;

subject thereto, to settlor for life; then, as to one moiety of stock, for

settlement, it will be observed, does not embrace future children, being adapted to a case where the settlor and his wife are of advanced age, and where their children are all of full age. If the general power of appointment is retained its effect will be to render this settlement practically revocable at the settlor's pleasure, so as to enable him to make provision for future issue if occasion should require. Where there is no such power, or no power of revocation, the exclusion of after-born children from a settlement should not too readily be determined on.

(*e*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of value of stock and amount of mortgage-debt.

Effect of general power of appointment.

(*f*) This general power of appointment (which in effect renders the settlement revocable at pleasure) may be retained or not as desired, without affecting the rest of the deed. The power being capable of exercise by the settlor for his own benefit may in the event of his bankruptcy, be executed by his trustee for the benefit of his creditors: see sect. 44 of the Bankruptcy Act, 1883 (46 &

[*settlor*] during his life [*insert, if desired, a charge on his life interest for maintenance of children, ut ante*, p. 618]; AND after the decease of the survivor of them the said [*settlor*] and [*wife*], his wife, shall stand possessed of the said trust premises upon the trusts hereinafter declared concerning the same respectively, that is to say, AS TO one moiety of the said sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock, UPON TRUST, to pay the income thereof unto [*eldest daughter*], wife of [*husband*], the eldest daughter of the said [*settlor*], during her life, for her separate use without power of anticipation; AND after her decease to transfer the same moiety unto or for the benefit of such child or children or other issue of the said [*eldest daughter*], in such proportions and manner as she shall by deed, revocable or irrevocable, or by will or codicil appoint; AND, subject thereto, to transfer the same unto such child or children of the said [*eldest daughter*] as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, if more than one, in equal shares; AND if there be no such child, to hold the same moiety upon the trusts hereinafter declared concerning the other moiety of the said sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock [*hotchpot and advancement clauses, ut ante*, p. 547]; AND as to the other moiety of the said sum of £——, $2\frac{3}{4}$ per cent. Consolidated Stock, UPON TRUSTS, and with and subject to powers and provisions, for the benefit of [*second daughter*], and her child or children and issue, corresponding as nearly as may be with the trusts powers and provisions hereinbefore declared concerning the first-mentioned moiety for the benefit of the said [*eldest daughter*], and her child or children and issue, AND subject thereto UPON THE TRUSTS,

eldest daughter for life;

then to issue as she shall appoint; in default,

to children at twenty-one or marriage;

if no children, upon trusts of other moiety.

Similar trusts of other moiety for benefit of second daughter and her issue;

47 Vict. c. 52), set out *ante*, Vol. II., p. 446; see also *Ex parte Meymot*, 1 Atk. 200.

In the form from which this Precedent is adapted the power of appointment was made exerciseable by deed only, it being formerly important not to afford any grounds for holding the instrument to be testamentary (see *Att.-Gen.* v. *Jones*, 3 Price, 368, and see *post*, sub. tit. WILLS, Vol. VII., p. 305), and because personal property passing under an appointment by will, made under a general power, is liable to legacy duty (*Re Cholmondeley*, 1 Cr. & M. 149), and to probate duty (22 & 23 Vict. c. 15, s. 4, see *post*, sub. tit. STAMP DUTIES, Vol. VII., pp. 183, 203, and 222); but now that the decision in *Att.-Gen.* v. *Jones* is virtually overruled, and that property passing under an appointment made by deed is liable to succession duty, including the additional duties imposed by the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), there is no great advantage in thus restricting the power of appointment.

As to giving power to appoint by will.

XXIII. **Post-Nuptial Settlement of Stock and Mortgage Debt.**

and with and subject to the powers and provisions hereinbefore declared concerning the first-mentioned moiety: AND on failure of the trusts aforesaid, then, as to the whole of the said stock, UPON THE TRUSTS hereinafter declared concerning the other trust property hereby settled: AND as to the said mortgage debt or sum of £——, UPON TRUSTS, as to each third part thereof, for the benefit of each of the other three daughters of the said [*settlor*] (namely [*names*]), and their respective children, and with cross limitations between them, corresponding as nearly as may be with the trusts hereinbefore declared concerning the said sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock for the benefit of the said two eldest daughters of the said [*settlor*], and with and subject to the like powers and provisions as are hereinbefore declared concerning the same sum of stock; AND on failure of such trusts, UPON THE TRUSTS hereinbefore declared concerning such stock: PROVIDED ALWAYS, that it shall be lawful for the said trustees or trustee, with the consent in writing of the person or persons of full age for the time being beneficially entitled to the income or any share of the income of the said trust premises or any part or parts thereof respectively, and if there be no such person, at their or his discretion, from time to time to change the investments of the said trust premises, or any such part or parts thereof, by selling or calling in and compelling payment thereof respectively and investing the monies arising thereby in the names or name of the said trustees or trustee, &c. [*investment clause, ante*, pp. 545, 554, 558, or 562; *power to appoint new trustees and trustee clauses, ante*, p. 552.] (*f*).

on failure of preceding trusts, upon trusts after declared of mortgage debt.

As to mortgage debt, upon similar trusts for benefit of other daughters and their issue; on failure thereof, upon trusts of stock.

General trust for conversion and investment.

IN WITNESS, &c.

(*f*) If desired, instead of an overriding power of appointment (*ante*, p. 640), the following power of revocation may be inserted. The insertion of the words *in brackets will* render the power applicable to real estate.

Power of revocation.

"PROVIDED LASTLY that it shall be lawful for the said [*settlor*], at any time or times hereafter, by any deed or deeds, revocable or irrevocable, or by will or codicil expressly referring to this power, to revoke wholly or in part the [uses] trusts, powers, and provisions hereinbefore declared and contained concerning the trust premises hereby settled, and the [rents, profits, and] income thereof, and to declare such new or other [uses and] trusts concerning the same or any of them, or any part or parts thereof respectively as he may think fit, for the benefit of himself the said [*settlor*] his [heirs], executors, or administrators, or any other person or persons."

XXIV. *VOLUNTARY SETTLEMENT for the benefit of an* IMPROVIDENT RELATIVE *and his* WIFE *and* CHILDREN. SPECIAL PROVISIONS *giving the Trustees a wide* DISCRETION *as to the* APPLICATION *of the Trust Funds.* POWER *for* TRUSTEES *to* DETERMINE *the* TRUST (*g*).

THIS INDENTURE (*h*), made the —— day of ——, 18—, BETWEEN [*settlor*], of, &c., of the one part, and [*trustee*], of, &c., and [*trustee*], of, &c., of the other part: WHEREAS the said [*settlor*] is desirous of making a provision for her nephew [*name*] and for his wife and issue in manner hereinafter appearing; AND WHEREAS there are now living two children of the said [*nephew*] by [*wife*] his wife, namely, [*son*] and [*daughter*]; AND WHEREAS the said [*settlor*], for the purpose of effectuating her said desire, and in consideration of her love and affection for the said [*nephew*] and his said wife and children, has now paid to the said [*trustees*] the sum of £—— (the receipt whereof the said [*trustees*] hereby acknowledge), to the intent that the same shall be held upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same: NOW THIS INDENTURE WITNESSETH and it is hereby agreed and declared that the said [*trustees*] and the survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee of these presents (hereinafter called "the said trustees or trustee"), shall stand possessed of the said sum of £——, UPON THE TRUSTS and with and subject to the powers and provisions hereinafter declared concerning the same, that is to say: UPON TRUST that the said trustees or trustee shall, at their or his absolute discretion, invest the said sum of £——, or any part thereof, as they or he may think fit, in their or his names or name, &c. [*continue investment clause, ut ante*, pp. 545, 554, 558, *or* 562]; WITH power, at such absolute discretion as aforesaid, to alter, vary, and transpose the said stocks, funds, [shares], and securities, with

Parties.

Recitals:
of desire to make settlement;
of state of relative's family;
of payment of sum to trustees.

Testatum.

Declaration of trusts of sum.

Trust for investment

power to vary investments.

(*g*) This Precedent is adapted from a deed of settlement which was made under very peculiar circumstances. Its provisions may be found convenient for insertion, with or without modification, as the nature of the case may require, in a settlement for the benefit of an improvident person, or useful as suggesting points to be considered and provided for in preparing such a settlement.

(*h*) Stamp, 5*s.* per 100*l.* or part of 100*l.* of the amount settled.

XXIV. Voluntary Settlement for improvident person, &c.

Discretionary trusts of income.

or for other stocks, funds, [shares], or securities of the same, or a like nature: And shall, at the absolute and uncontrolled discretion of them or him the said trustees or trustee, pay or apply all, or any, or no part of the annual income arising from the said sum of £——, and the investments for the time being representing the same (hereinafter called "the said trust fund"), as the same shall accrue due, and without anticipation (except as is hereinafter otherwise provided), unto or for the maintenance, support, or otherwise for the benefit of the said [*nephew*] and [*wife*], and any other wife with whom he may intermarry after her death, and the said [*children*], and any other children or issue hereafter to be born of the said [*nephew*] by the said [*wife*] or any such other his wife as aforesaid, and for the time being in existence, or any one or more exclusively of the others or other of such persons, in such shares, and in such manner in all respects, as the said trustees or trustee shall think proper or expedient; But so that nothing herein contained shall confer on or vest in the said [*husband*] or [*wife*], or either of them, or any other such person as aforesaid, any interest for life or other interest which could be the subject of any anticipation, charge, or disposition by them, him, her, or any of them, or become liable to their, his, her, or any of their debts, or of or over which they, he, she, or any of them, or their, his or her respective creditors or trustee in bankruptcy, might or could require or obtain transfer, possession, or payment, or exercise any power of control or interference; Or that the said trustees or trustee shall, at their or his absolute discretion, for the period of twenty-one years from the date of these presents, or for such shorter period as they or he shall think proper or expedient, accumulate the said income, or such part thereof as shall not for the time being be paid or applied by them or him under the discretionary trust hereinbefore contained, or under or by virtue of any other trust, power, or provision hereby declared, in the way of compound interest, by investing such income and the resulting income thereof from time to time in some of the stocks, funds, [shares], or securities hereinbefore authorised for investment of the said sum of £——, for the

Alternative trust for accumulation of income (*i*).

(*i*) As to accumulation, see *post*, sub. tit. Wills, Vol. VII., p. 447. In the marginal note at p. 448 of that volume for "and twenty-one years," read "or twenty-one years."

XXIV. Voluntary Settlement for improvident person, &c.

benefit of the persons or person who may under the trusts herein declared become entitled to the said trust fund, and if more than one in the shares in which they may become so entitled: PROVIDED ALWAYS that it shall be lawful for the said trustees or trustee at any time or times, at such discretion as aforesaid, to resort to the accumulations of any preceding year or years or portion of a year, and pay or apply the same to or for all or any of the persons or purposes to or for which the income of the said trust fund is payable or applicable under or by virtue of any of the trusts, powers, or provisions herein declared or contained; AND IT IS HEREBY DECLARED that the said trustees or trustee shall, at such time or respective times as they or he shall think fit, at their or his absolute and uncontrolled discretion, pay or transfer the said trust fund and any accumulations thereof, or so much thereof as shall not have been paid or applied under, or by virtue of any of the trusts, powers, or provisions of these presents, or any part thereof respectively, for the advancement or benefit of the said [*son*] and [*daughter*] and any other children, or remoter issue of the said [*nephew*] by any wife, to be born in his lifetime, or within twenty-one years after his death, or any one or more exclusively of the others or other of such children or issue, in such shares, if more than one, and generally subject to such conditions and in such manner as the said trustees or trustee shall think fit: PROVIDED ALWAYS that it shall be lawful for the said trustees or trustee, if they or he shall in their or his absolute discretion so think fit, instead of paying or transferring the income or capital of the said trust fund and accumulations, or any part thereof respectively, unto or among, or themselves or himself applying the same respectively for the benefit of all or any of the children or other such issue as aforesaid of the said [*nephew*], pay such income, capital, and accumulations, or any part thereof respectively, to the parents or parent, or guardian or guardians, or other persons or person having for the time being the charge or control of, or being the employers or employer of such children, child, or issue, and it is hereby declared that the receipt of any such persons or person shall be a sufficient discharge to the said trustees or trustee for any monies, stocks, funds, [shares,] or securities so paid by them or him, and that the said trustees or trustee shall not be bound to see to the application, or be responsible for any loss or misapplication thereof; AND it is hereby further declared

Power to resort to accumulations.

Discretionary trusts as to application of capital for benefit of nephew's issue.

Power to pay income or capital to parents or guardians, &c., of issue.

Power to

XXIV. Voluntary Settlement for improvident person, &c.

that if the said trustees or trustee shall think fit to pay or apply any part of the said trust fund for the benefit of the said [*son*] and [*daughter*], or either of them, it shall be lawful, upon their, his, or her respective marriages or marriage, for the said trustees or trustee to pay or transfer such part of the said trust fund, or any part of such part, to any trustees, and, at the cost of the trust premises, to settle the same upon such trusts for the respective lives or life of the said [*son*] and [*daughter*], or either of them, or for any lesser interests or interest, either absolute or determinable on alienation or bankruptcy or otherwise, and with and subject to such powers (including a power of appointing new trustees) and provisions and in such manner in every respect as the said trustees or trustee shall think fit: PROVIDED ALWAYS, and it is hereby declared that, subject and without prejudice to any of the trusts, powers, and provisions herein declared and contained, the said trustees or trustee shall stand possessed of the said trust fund and any accumulations thereof, and the income thereof respectively, or so much respectively as shall not have been paid or applied under any of the trusts, powers, and provisions herein declared and contained, IN TRUST for all the children or any the child of the said [*nephew*] by any wife who, being sons or a son, shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, and, if more than one, in equal shares; AND if there shall be no such child, then in trust for the said [*settlor*], her executors, administrators, and assigns: PROVIDED ALWAYS that it shall be lawful for the said trustees or trustee, if they or he shall in their or his absolute discretion so think fit, at any time or times, to lay out the whole, or any part of the said trust fund, and any accumulations thereof, for the purpose of a residence or business, for any persons or person intended to be benefited by this present settlement, or by way of investment in or towards the purchase or payment of any fine or premium payable in respect of any freehold, copyhold, or leasehold messuage or other building or part of a messuage or building, farm, lands or hereditaments in the United Kingdom, or any colony or dependency thereof, or of furni-

settle funds applicable for benefit of nephew's son and daughter (*j*).

Trust of funds not otherwise applied for nephew's children equally, sons at twenty-one, and daughters at twenty-one or marriage.

Ultimate trust for settlor.

Power to purchase land, &c., for residence, business, or investment, and furniture, plant, &c.

(*j*) This power is restricted to the parts applied for the benefit of the *existing* children, so as not to transgress the rule against perpetuities, as to which see *post*, sub. tit. WILLS, Vol. VII., pp. 420, *et seq.*

XXIV. Voluntary Settlement for improvident person, &c.

ture, plant, implements, utensils, live or dead stock, materials or effects to be purchased either together with any such messuage, building, part of a messuage or building, farm, lands, or hereditaments as aforesaid or otherwise, but to be used or enjoyed for the purpose of such residence or business as aforesaid, UPON TRUST nevertheless, at the absolute discretion of the said trustees or trustee, to re-sell the property so purchased or any part thereof, at such time or times, and in such manner as they or he shall think fit, and to stand possessed of the net proceeds of any such re-sale (after payment of the expenses of and incident thereto, and of and incident to any of the trusts, powers, and provisions herein contained, and for the time being payable), upon, with, and subject to the same trusts, powers, and provisions, as the money so laid out would have been subject to if the same had not been so laid out; the rents, profits, and income of the property purchased being paid or applied in the meantime, and until such re-sale, as the income of the money so laid out would have been payable or applicable if such money had not been so laid out, and all property so purchased being to all intents and purposes considered as personalty: AND it is hereby declared that it shall be lawful for the said trustees or trustee to manage, either personally or by any agent, bailiff, or other person, or to demise or lease any property which may be so purchased as aforesaid, or any part thereof, until the re-sale thereof, upon such terms and in such manner as they or he shall think fit: PROVIDED ALWAYS that it shall be lawful for the said trustees or trustee, with the consent of the said [*settlor*] during her life, and, after her death, in the absolute and uncontrolled discretion of the said trustees or trustee, at any time or times, to pay or transfer by way of loan, with or without security, or of absolute or conditional gift, to the said [*nephew*] the whole or any part of the said trust fund and the accumulations (if any) thereof, to be applied in or towards the purchase of any furniture, plant, implements, utensils, live or dead stock, or effects, to be used or enjoyed by him for the purposes of a residence or business, or for any other purpose which the said trustees or trustee shall with such consent or at such discretion as aforesaid under the circumstances think proper or expedient; But so, nevertheless, that the said trustees or trustee shall not be answerable or accountable for the insufficiency of any security taken by them or him in respect of any such loan as aforesaid, or for the loss, misappli-

Trust for re-sale.

Powers of management, leasing, &c.

Power to advance or give trust funds to nephew.

Trustees' indemnity clause.

XXIV. **Voluntary Settlement for improvident person, &c.**

cation, or non-application of any money or property advanced or given by them or him under the power lastly hereinbefore contained: PROVIDED ALWAYS, and it is hereby declared, that the said trustees or trustee shall be answerable and accountable for or in respect of their or his dealings, acts, deeds, omissions, and defaults in relation to the trust premises to the said [*settlor*], her executors, administrators, and assigns only, and that no other person shall have any right or power to call in question any such dealing, act, deed, omission, or default; And further that it shall be lawful for the said trustees or trustee at any time hereafter if they or he shall, in their or his discretion, think fit so to do, to pay or transfer all the trust premises which shall then remain in or under their possession or control by virtue of these presents, unto the said [*settlor*], her executors or administrators, And immediately upon such payment or transfer, all the trusts, powers, and provisions herein declared and contained, and all liability of the said trustees or trustee shall, so far as relates to the trust premises so paid or transferred by them or him, absolutely cease and determine.

Proviso that trustees shall be accountable to settlor only.

Power to determine trusts of settlement.

IN WITNESS, &c.

XXV. *DEED of* ARRANGEMENT *by way of* VOLUNTARY SETTLEMENT *of Funds derived under a previous Settlement and other Instruments, for the purpose of* SAVING *Female* BENEFICIARIES *from* LOSS *arising from* DEPRECIATED INVESTMENTS *of some of the Funds, and making* PROVISION *for* CHILDREN *of the Settlors* (*k*).

THIS INDENTURE (*l*), made the —— day of ——, 18—, BETWEEN [A. B.], of, &c., of the first part; [C. B.],

Parties.

(*k*) This Precedent is inserted as a specimen of a voluntary settlement for the purpose of carrying out a family arrangement with regard to personalty. The provisions to be inserted in such instruments of course vary according to the circumstances of each particular case, and generally require very careful consideration and drafting. In this case C. B. was one of the executors of his deceased sister-in-law, K. B., and the funds intended to be settled by this deed were vested in him, as such, jointly with the other trustee.

(*l*) Stamp 5*s.* per 100*l.* or part of 100*l.* of the amount settled.

XXV. Voluntary Settlement to carry out family arrangement.

of, &c., of the second part; [D. F.], of, &c., and [E.] his wife (formerly [E. B.], spinster), of the third part; [G. B.], of, &c., spinster, of the fourth part; [H. B.], of, &c., of the fifth part; and [*trustee*], of, &c., and [*trustee*], of, &c., and [*trustee*], of, &c., of the sixth part: WHEREAS under or by virtue of an indenture dated, &c., and made between [*parties*] (being the settlement made on the marriage of the said [J. B.] and [K. B.] his wife, both since deceased, the father and mother of the parties hereto of the first five parts, other than the said [D. F.]), the will of [L. B.], the father of the said [J. B.], deceased, a deed poll of appointment dated, &c., under the hands and seals of the said [J. B.] and [K. B.] his wife, and the will of the said [K. B.], the several parties of the first five parts, other than the said [D. F.], together with their late sister [N. B.], deceased, and [O. B.], also deceased, the widow of their late brother [P. B.], became, at the death of their late mother the said [K. B.], on the —— day of ——, 18—, entitled in unequal proportions to certain trust funds, which then consisted of the following particulars, that is to say, [*specify particulars of investments of the trust funds, including stock of a Canal Company*]: AND WHEREAS the sum of £——, Consolidated 3*l.* per Cent. Annuities, part of the said sum of £—— like annuities, and the said sum of £——, Debentures of the —— Railway Co., have been sold, and the net proceeds thereof applied first in payment of debts, pecuniary legacies, and funeral and testamentary expenses; secondly in payment to the said [O. B.], deceased, of her share in the said trust funds; thirdly in several advances amounting to the sum of 5463*l.* 1*s.* 6*d.* to the said [A. B.]; fourthly in a further advance of 1316*l.* 8*s.* 4*d.* to the said [H. B.]; and fifthly in the purchase of a sum of 480*l.* Debenture Stock of the —— Railway Co.: AND WHEREAS the several stocks, funds, shares, and securities now representing the residue of the said trust premises hereinbefore specified (other than the sums so applied as aforesaid, but including the said sum of 480*l.* Debenture Stock of the —— Railway Co.), are now standing in the names of, or otherwise vested in the said [*trustees*] as executors of the will of the said [K. B.], deceased, and they and the survivor of them or other the trustees or trustee for the time being of these presents are hereinafter called "the said trustees or trustee;" AND WHEREAS, according to an estimate of the value of the respective investments constituting

Recitals:

of title of the several parties to shares in funds derived from various sources;

of payment of one share, advances in respect of other shares, and of change of investment of part of funds;

of state of investment of residue of funds;

of estimated amounts to which the

XXV. **Voluntary Settlement to carry out family arrangement.**

the said residue of the said trust premises made immediately after the death of the said [K. B.] (in which estimate the said sum of £——, Stock of the —— Canal Co. was taken at par), the several parties hereto of the first four parts, and the said [N. B.] deceased, would have been entitled, if such investments had been converted into money, to the following sums, that is to say, the said [A. B.] to the sum of 3993*l.* 18*s.* 4*d.*, the said [C. B.] to the sum of 4694*l.* 7*s.* 2*d.*, the said [E. F.] to the sum of 5173*l.* 18*s.* 4*d.*, the said [N. B.], deceased, to the sum of 5573*l.* 18*s.* 4*d.*, and the said [H. B.] to the sum of 3873*l.* 14*s.* 4*d.*: And whereas the said [N. B.] died on the —— day of ——, 18—, having by her will dated, &c., and proved, &c., devised and bequeathed all her real and personal estate to the said [G. B.], and appointed her sole executrix thereof; And whereas, for some years past, no interest has been paid upon the said sum of £——, Stock of the —— Canal Co., and the said [C. B., *one of the trustees and executors*], has advanced to the several persons entitled thereto various sums of money towards making good such deficiency, amounting in the whole to 2000*l.*; And whereas it is estimated that the loss with respect to the said Stock of the —— Canal Co. will not be less than 7200*l.* in capital value, in addition to the loss of interest already sustained thereon; And whereas the said [A. B.] and [C. B.] and [H. B.], being desirous that such loss should not be borne by the said [E. F.] or, as to the income thereof, by the said [G. B.], have agreed with the said [D. F.] and [E. F.] his wife, and the said [G. B.], and also with the said [*trustees*], to enter into the arrangements hereinafter expressed, whereby her full share of the trust funds will be secured to the said [E. B.], and an adequate income secured to the said [G. B.] for her life, on condition that the sum of 2000*l.* so advanced by the said [C. B.] as aforesaid shall be repaid to him on the death of the said [G. B.], and that the sum of 7200*l.*, the estimated loss on the said Stock on the —— Canal Company, shall also be paid on her death to the said [A. B.], [C. B.], and [H. B.] in equal shares; And whereas the said [G. B.] is also desirous that during the joint lives of herself and the said [E. F.] the income payable to the said [E. F.] from the trust funds shall be equal to the income payable to her the said [G. B.]; And whereas the said [D. F.] and [E. F.] are de-

respective beneficiaries are entitled in the residue of the funds;

of death of a beneficiary bequeathing her share to another beneficiary;

that no interest has been paid in respect of one of the investments; and that C. B. has made up the deficiency;

of estimated loss by depreciation of such investment;

of agreement for arrangement to secure female beneficiaries from loss;

of arrangement as to income;

XXV. Voluntary Settlement to carry out family arrangement.

sirous that her share of the trust funds shall be settled upon the trusts hereinafter declared, and the said [A. B.] is desirous that the said sum of 2400*l.* being the one third so to become payable to him as aforesaid of the said sum of 7200*l.* on the death of the said [G. B.] and [H. B.] shall be paid in manner hereinafter appearing; and the said [C. B.] is desirous that the sum of 2000*l.* and 2400*l.* to become payable to him at the death of the said [G. B.] as aforesaid shall be settled in manner hereinafter appearing, and the said [H. B.] is desirous that the sum of 2400*l.* to become payable to him on the death of the said [G. B.] as aforesaid shall be settled in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that each of them the parties hereto of the first four parts hereby covenants and declares with and to the other and each other of them (the said [D. F.] also covenanting for the said [E. F.]), in manner following, that is to say:—

of desire to settle shares in the funds.

Testatum.

Agreement for arrangement and settlements.

1. That for the purpose of providing for the income of the said [E. F.] and [G. B.], and for other the purposes herein stated, each of them the said [A. B.], [C. B.], and [H. B.], shall be debited in the accounts of the said trust funds with the sum of 2400*l.*

That A. B. and C. B. and H. B. shall each be debited 2,400*l.* in account.

2. That the said [A. B.], [C. B.], and [H. B.] respectively, and their executors, administrators, or assigns shall, as from the date of the —— day of —— next, pay to the said trustees or trustee interest at the rate of 4 per cent. per annum upon the several sums of money following, namely, of the said [A. B.] on the sum of 3869*l.* 3*s.* 2*d.*, the said [C. B.] on the sum of 397*l.* 12*s.* 10*d.*, and the said [H. B.] on the sum of 4442*l.* 10*s.* 0*d.*, being the net amounts which will respectively stand to their debit with the trust estate, after adding to the several advances made to each of them, the said sum of 2400*l.*, and deducting their respective shares in the said trust funds, according to the estimate value made at the death of their mother the said [A. B.], and that the said sums of 3869*l.* 3*s.* 2*d.*, 397*l.* 12*s.* 10*d.*, and 4442*l.* 10*s.* 0*d.*, together with the Stock of the said Canal Company, and the —— Debenture Stock shall henceforth constitute the trust funds.

That A. B., C. B. and H. B. shall pay interest on net amounts standing to their debit in account.

3. That during the joint lives of the said [E. F.] and [G. B.], the interest so to be paid by the said [A. B.], [C. B.], and [H. B.], and all other income of the trust funds, if and

That the two sisters shall during their joint lives

XXV. **Voluntary Settlement to carry out family arrangement.**

whenever the same shall not exceed 800*l.* per annum, shall be equally divided between the said [E. F.] and [G. B.], the income of the said [E. F.] being paid to her for her separate use without power of anticipation; And if the income of the trust funds shall in any year exceed the sum of 800*l.*, the surplus shall be equally divided between the said [A. B.], [C. B.], and [H. B.], their respective executors, administrators, and assigns.

receive 400*l.* per ann. out of the income, the residue, if any, to be divided between the brothers.

4. That on the death of either of them the said [E. F.] and [G. B.], the said trustees or trustee shall set apart, out of the trust funds, the sum of 5173*l.* 18*s.* 4*d.*, and shall stand possessed thereof upon the trusts hereinafter declared concerning the same, that is to say, UPON TRUST to pay the income thereof to the said [E. F.], if she shall survive the said [G. B.], for her separate use without power of anticipation, and after her death to pay such income to the said [D. F.] and his assigns during his life, and after the death of the survivor of them, the said [D. F.] and [E. F.] his wife, IN TRUST for all or such one or more of the children of the said [E. F.] in such shares and proportions, if more than one, for such estates and interests, and with such limitations over as the said [E. F.] shall, whether covert or sole, by deed, will, or codicil appoint; And in default of and subject to any such appointment, IN TRUST for [*names*] the three children now living of the said [E. F.], their executors, administrators, or assigns, in equal shares.

That on the death of either sister the sum of 5,173*l.* 18*s.* 4*d.* shall be set apart for the married sister, her husband, and children.

That the unmarried sister surviving shall receive 400*l.* out of income for her life.

5. That if the said [G. B.] shall survive the said [E. F.], the income of the residue of the said trust funds, if the same shall not exceed the annual sum of 400*l.*, shall be paid to the said [G. B.] and her assigns during her life; And if and whenever such income shall in any year exceed the said sum of 400*l.*, the surplus shall be divided equally between the said [A. B.], [C. B.], and [H. B.], their executors, administrators, or assigns.

That on death of unmarried sister the residue of the trust funds shall be called in and divided.

6. That on the death of the said [G. B.], the said trustees or trustee shall call in and convert into money the residue of the trust funds, And shall stand possessed thereof upon the trusts following, that is to say, FIRST, as to the sum of 2000*l.*, to pay the same to [*children of C. B.*] or such of them as shall attain the age of twenty-one years, or, being daughters or a daughter, marry under that age, in equal shares; but in case they shall all die under age and unmarried, then

XXV. Voluntary Settlement to carry out family arrangement.

the said trustees or trustee shall stand possessed of the said sum of 2000*l.* Upon trust for the said [C. B.], his executors, administrators, or assigns: Secondly, as to the said sum of 7200*l.* to pay the sum of 2400*l.*, part thereof, to the said [A. B.], his executors, administrators, or assigns; the sum of 2400*l.*, other part thereof, to the persons entitled to the said sum of 2000*l.* under this article; and the sum of 2400*l.*, being the residue of the said sum of 7200*l.*, to [R. B.], the daughter of the said [H. B.], her executors, administrators, or assigns: The said several sums of 2400*l.* each to be paid *pari passu*, and without priority; And as to one equal fourth part of the residue, if any, of the trust funds upon the trusts hereinbefore declared with reference to the said sum of 5179*l.* 18*s.* 4*d.*, and upon further trust to pay and divide the remaining three equal fourth parts of such residue unto and equally between the said [A. B.], [C. B.], and [H. B.], their executors, administrators, and assigns.

Trust for investment.

7. That so long as any of the trust funds shall remain unapplied or undisposed of, it shall be lawful for the said trustees or trustee either to retain the same in their actual state of investment or to invest the same, &c. [*investment clause, ante*, pp. 545, 554, 558, *or* 562; *power to vary investments, ante*, p. 545].

Covenant by C. B. to make up the income of each sister to 400*l.* per ann.

8. And the said [C. B.] hereby covenants with the said [D. F.] and [E. F.] his wife, and also as a separate covenant with the said [G. B.], that if in any year or years during the joint lives of the said [C. B.] and [E. F.], or during the lives of the said [C. B.] and [G. B.], the share of either of them the said [G. B.] and [E. F.] in the income of the trust funds shall be less than 400*l.*, he, the said [C. B.], will make up the deficiency, so that during the life of him the said [C. B.] each of them the said [E. F.] and [G. B.], or such one of them as shall for the time being be living, shall receive the sum of 400*l.* per annum from the trust funds.

In witness, &c.

XXVI. *DECLARATION OF TRUST (by Supplemental Deed) of* STOCKS, *&c., added to Trust Funds comprised in a Settlement (m).*

Parties.

THIS INDENTURE (*n*), made the —— day of ——, 18—, BETWEEN [*settlor*], of, &c., of the one part, and [*trustee No.* 1], of, &c., [*trustee No.* 2], of, &c., and [*trustee No.* 3], of, &c., of the other part, AND SUPPLEMENTAL to an indenture (hereinafter called "the principal indenture") dated, &c., and made, &c., being a settlement made and executed in consideration of the then intended marriage, which was shortly afterwards solemnized between the said [*husband*] and [*wife*]:

Recitals: of death of original trustee, and appointment of new trustee:

WHEREAS [*deceased trustee*] died on the —— day of ——, 18—, And by an indenture dated, &c., and made, &c., and endorsed on the principal indenture, in pursuance of a power contained in the same indenture, the said [*trustee No.* 3] was duly appointed to be a trustee in the place of the said [*deceased trustee*] for the purposes of the principal indenture, And the trust funds and property subject to the trusts of the principal indenture were, by the indenture now in recital or immediately after the execution thereof, duly assured and transferred to, or otherwise effectually vested in the said [*trustee No.* 3] jointly with the said [*trustees Nos.* 1 *and* 2] upon the trusts of the principal indenture; AND WHEREAS the said [*settlor*] has transferred into the names of the said [*trustees*] the several stocks, funds, shares, and securities following, that is to say, the sum of £——, $2\frac{3}{4}$ per Cent. Consolidated Stock, the sum of £——, 4 per Cent. Debenture Stock of the —— Railway Company, and —— shares of £—— each in the —— Company [*or*, the several stocks, funds, shares, and securities, the particulars whereof are specified in the Schedule hereunder written], to the intent that the same shall be held upon the trusts, and with and subject to the powers and provisions hereinafter declared concerning the same: NOW THIS INDENTURE WITNESSETH, that it is hereby agreed and declared that the said [*trustees*], and the survivors or survivor of them, or

of transfer by settlor of stocks, &c., to trustees.

Testatum.

Declaration that stocks, &c., trans-

(*m*) In most cases where additions are made to trust funds, a mere memorandum not under seal according to the form given in the next Precedent will be sufficient.

(*n*) Stamp 5*s.* per 100*l.* or part of 100*l.* of the amount added to the trust funds.

XXVI. Declaration of trust of stock added to settled funds.

the executors or administrators of such survivor, or other the trustees or trustee of these presents, shall stand possessed of the said several stocks, funds, shares, and securities so transferred to them as aforesaid, and the stocks, funds, shares, and securities for the time being representing the same and the income thereof, UPON SUCH TRUSTS, and with and subject to such powers and provisions as are by and in the principal indenture declared and contained concerning the trust funds and property [*or* the husband's trust fund] therein comprised and thereby settled, or such of the same trusts, powers, and provisions as are now or may henceforth be subsisting or capable of taking effect, but not so as to increase or multiply charges or powers of charging to the intent that the said several stocks, funds, shares, and securities so transferred to the said [*trustees*] as aforesaid may form an addition to and one fund with the trust funds and property [*or* the husband's trust fund] originally settled by the principal indenture.

ferred shall be held on trusts of settlement.

IN WITNESS, &c.

[THE SCHEDULE ABOVE REFERRED TO.]

XXVII. *MEMORANDUM (to be endorsed on a Settlement) of the* ADDITION *of a Sum of* STOCK *to the Trust Funds.*

MEMORANDUM (*o*) that I, the within-named [*settlor*], did on the —— day of ——, 18—, transfer into the names of the within-named [*trustees*] [*or* of [*trustees*], the present trustees of the within-written indenture], the sum of £——, $2\frac{3}{4}$ Consolidated Stock, to be held by them upon the trusts by the same indenture declared concerning the trust funds [*or* the wife's trust fund] thereby settled so far as the same trusts are still subsisting.

AS WITNESS my hand this —— day of ——, 18—.

(*o*) Stamp 5*s.* per 100*l.* or part of 100*l.* of the amount added to the trust funds.

XXVIII. *SETTLEMENT, on* MARRIAGE (*by* ONE DEED), *of* FREEHOLD, COPYHOLD, *and* LEASEHOLD *Estates, and* PERSONALTY, *upon* TRUST *for* SALE, *where Part of the Settled Property belongs to the intended Husband, and Part to the intended Wife.* POWER *for* HUSBAND *and* WIFE *respectively by* WILL *to* DIRECT, *on Default of Issue, that a* SUM *shall be* RAISED *out of their respective Trust Properties and applied as directed* (*p*).

Parties.

THIS INDENTURE (*q*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the third part, WITNESSETH that, in consideration of an intended marriage between the said [*husband*] and [*wife*], the said [*husband*] hereby grants, assigns, and as settlor conveys unto the said [*trustees*], their heirs, executors, administrators, and assigns, ALL the freehold and leasehold lands and hereditaments and personal property specified in the first schedule hereto, TO HOLD the said hereditaments and other premises, UNTO AND TO THE USE of the said [*trustees*], their heirs, executors, administrators, and assigns, according to the respective natures thereof, Upon the trusts hereinafter declared: AND [*like conveyance and assignment, by intended wife, of property described in the second schedule*]: AND the said [*husband*], but only as to the hereditaments and premises comprised in the first schedule hereto, and for and against the acts and defaults of himself, and of all persons claiming or to claim through, under, or in trust for him; And the said [*wife*], but only as to the hereditaments and premises comprised in the second schedule hereto, and for and against the acts and defaults of herself, and of all persons claiming or to claim through, under, or in trust for her, do hereby respectively,

Testatum.

Conveyance and assignment of husband's freeholds, leaseholds, and personalty to trustees.

Conveyance and assignment of wife's freeholds, leaseholds, and personalty.

Covenants to surrender copyholds, and for title, &c.

(*p*) The more usual mode of settling land upon trust for sale is by means of two separate deeds as in the following Precedents, and this mode should invariably be adopted where a sale is likely to be effected immediately or soon after the date of the settlement for the reasons stated *ante*, p. 224. If, however, the land is retained unsold, the trusts of the settlement, whether declared in the deed of conveyance as in the text of the above Precedent, or by a separate deed, must sooner or later become part of the title of the land.

(*q*) Stamps, 30*s.* in respect of the lands, and *ad valorem* in respect of the personalty if of such a nature as to be subject thereto, see *ante*, p. 540.

XXVIII. Settlement by One Deed of Freeholds, Copyholds, Leaseholds, and Personalty.

with the approbation of the other of them the said [*wife*] and [*husband*] respectively covenant with the said [*trustees*] That the copyhold hereditaments, respectively described in the schedules hereto, shall forthwith, after the said intended marriage, be surrendered, or otherwise assured, and they respectively as settlors convey the same hereditaments, To THE USE of the said [*trustees*], their heirs and assigns, for ever, upon the trusts hereinafter declared; AND IT IS HEREBY AGREED AND DECLARED, that the said [*trustees*], and the survivors and survivor of them, and the heirs, executors and administrators of such survivor (*q*), and other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee"), shall stand seised and be possessed of the said hereditaments and other premises, UPON TRUST, with the consent in writing of the said [*husband*] and [*wife*], or of the survivor of them, and, after the death of such survivor, at the discretion of the said trustees or trustee, at any time or times to sell and convert into money the said premises, or any hereditaments to be purchased as hereinafter mentioned, or any part or parts thereof respectively; And also, with such consent or at such discretion as aforesaid, to invest such capital monies as from time to time shall come to their or his hands by virtue of these presents, in or upon any of the stocks, funds, [shares], or securities hereinafter authorised for investment of such monies, or in the purchase of freehold or copyhold lands of inheritance in England or Wales, or of lands held upon lease for any term whereof sixty years at least shall be unexpired at the time of such purchase, with power from time to time to vary such investments: AND that the said trustees or trustee shall stand seised and be possessed of the said trust premises and investments and the income

Trust for sale.

Trust to invest and vary securities, or to purchase lands.

(*q*) It is not now correct to say "*heirs*, executors, or administrators," except where copyholds are settled, as a trust estate in freeholds, as well as leaseholds, now devolves on the personal representatives of the last surviving trustee: see sect. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), set out *ante*, sub tit. "MORTGAGES," Vol. III., p. 965. This enactment originally applied also to copyholds, see *Re Hughes*, W. N., 1884, p. 53; but sect. 45 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73), enacts that it shall not apply to "land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage." A conveyance by the personal representative of a sole trustee of copyholds before the passing of the Act of 1887 is valid: *Re Mills' Trusts*, 40 Ch. D. 14.

XXVIII. **Settlement by One Deed of Freeholds, Copyholds, Leaseholds, and Personalty.**

thereof upon the trusts following, that is to say: As to the premises comprised in the said first schedule hereto, and the monies, stocks, funds, [shares], and securities, or other property, into or for which the same premises or any of them may be converted or invested (hereinafter called "the husband's trust property"), and the rents, profits, and income thereof, In trust for the said [*husband*] until the said intended marriage shall take place, and thereafter Upon trust to pay the rents, profits, and income of the said husband's trust property to the said [*husband*] during his life; And from and after his death to the said [*wife*], if she shall survive him, during her life, for her separate use, but so that she shall not have power to dispose of or charge such reversionary life interest during the now intended coverture by way of anticipation; And as to the premises comprised in the second schedule hereto, and the monies, stocks, funds, [shares], and securities or other property into or for which the same last-mentioned premises, or any of them, may be converted or invested (hereinafter called "the said wife's trust property"), and the rents, profits, and income thereof, In trust for the said [*wife*] until the said intended marriage shall take place, and thereafter Upon trust to pay the rents, profits, and income of the said wife's trust property to the said [*wife*] during her life for her separate use without power of anticipation; And from and after her death to the said [*husband*] during his life; And from and after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of both the said husband's trust property and the said wife's trust property and the income thereof respectively, Upon trust, &c. [*for issue as husband and wife shall jointly appoint, and in default of such appointment as the survivor shall appoint, and in default of any appointment for children equally at twenty-one or marriage; hotchpot clause; power of advancement, ante*, pp. 546, 547; *trusts of capital in default of issue as to the "husband's trust property" for him absolutely, ante*, p. 586, *and as to the "wife's trust property" upon the usual trusts in her favour, ante*, p. 548]: Provided always, and it is hereby agreed and declared, that the said trustees or trustee shall, from time to time, with such consent or at such discretion as aforesaid, invest all capital monies and accumulations which may from time to time come into their or his hands under or by virtue of the trusts of these presents, in their or his names or name, &c. [*investment clause, ante*, pp. 545, 554, 558, or 562]:

Trusts of income of husband's property; for husband for life; remainder for wife surviving.

Trusts of income of wife's property; for wife for life; remainder for husband surviving.

Trusts of both properties for issue of marriage and ultimate trusts.

Proviso as to investment of trust monies.

XXVIII. Settlement by One Deed of Freeholds, Copyholds, Leaseholds, and Personalty.

PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee, with such consent or at such discretion as aforesaid, to exchange any of the lands and hereditaments respectively described in the said schedules hereto for any other lands or hereditaments in the purchase of which capital monies are hereinbefore authorised to be invested, and upon any such exchange to pay or receive money for equality of exchange: PROVIDED ALWAYS that it shall be lawful, as to the lands and hereditaments described in the said first schedule hereto, and any lands and hereditaments which may be taken in exchange therefor, for the said [*husband*] during his life, and, as to the said lands and hereditaments described in the said second schedule hereto, and any lands or hereditaments which may be taken in exchange therefor, for the said [*wife*] during her life, and, as to the whole of the lands respectively described in the said schedules hereto, after the death of either of them, the said [*husband*] and [*wife*], for the survivor of them during his or her life, and after the death of such survivor for the said trustees or trustee to let or demise all or any part of the same premises respectively, or such of the same as shall for the time being remain unsold under the trust for sale hereinbefore contained at the best rent obtainable, without fine or premium, for any term not exceeding twenty-one years to take effect in possession or within six calendar months after the date of any such lease: PROVIDED ALWAYS, and it is hereby further agreed and declared, that it shall be lawful for the said trustees or trustee to determine out of which of the said husband's trust property and wife's trust property respectively, and out of what part thereof respectively, and whether out of capital or income thereof respectively, any expenses or outgoings shall or ought to be borne, and, in case it shall become doubtful, which part or parts of any trust property for the time being subject to the trusts of these presents shall represent each original trust property, to apportion and divide such blended trust property for the purposes of these presents as fully and effectually as might be done by a Court of competent jurisdic-

Power to exchange.

Power of leasing (*r*).

Power for trustees to determine questions, apportion blended funds, &c.

(*r*) It is advisable to insert in conveyances by way of trust for sale express powers of leasing as the statutory powers of a tenant for life become exerciseable only on an application to the Court: see *ante*, p. 228. Where such express powers are given to tenants for life, they are usually restricted so as not to enable terms exceeding twenty-one years to be granted. For more extensive powers of leasing, see *post*, pp. 663, 682.

XXVIII. **Settlement by One Deed of Freeholds, Copyholds, Leaseholds, and Personalty.**

tion in an action or other proceeding duly instituted for that purpose (*s*): PROVIDED ALWAYS, and it is hereby agreed and declared, that if there shall be no child of the said intended marriage who, being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, it shall be lawful for each of them the said [*husband*] and [*wife*], notwithstanding that he or she may die in the lifetime of the other of them, by will or codicil to appoint that the said trustees or trustee shall after the death of such one of them the said [*husband*] and [*wife*] as shall make such appointment, and such default or failure of issue of the said intended marriage, raise any sum or sums of money not exceeding in the whole the respective sums following, that is to say, if such appointment shall be made by the said [*husband*] the sum of £——, and if such direction and appointment shall be made by the said [*wife*] the sum of £——, and shall pay and apply the sum or sums so raised to such person or persons or for such purpose or purposes as the said [*husband*] or [*wife*], as the case may be, shall by such appointment or appointments as aforesaid direct; And that in case of any such appointment or appointments, the said trustees or trustee shall immediately, or as soon as circumstances will permit (notwithstanding that the said [*wife*] or [*husband*], as the case may be, shall be then living, and either with or without her or his consent, or concurrence), raise the sum or sums of money specified in such appointment or appointments by sale or mortgage, or conversion into money, of a competent part of the husband's trust property, or of the wife's trust property, according as such appointment or appointments shall be made by the said [*husband*] or by the said [*wife*]; and shall pay and apply such sum or sums of money to such person or persons, or for such purpose or purposes, as in such appointment or

Power for husband and wife respectively, if no child attains twenty-one, &c., to appoint any sum not exceeding —*l.* and —*l.* respectively to be raised and applied as he or she thinks proper (*t*).

Trustees to raise same accordingly.

(*s*) Inasmuch as, where land is settled upon trust for sale the powers conferred by sect. 63 of the Settled Land Act, 1882 (*i.e.*, the statutory powers of a tenant for life under that Act), are not to be exercised without the leave of the Court, it does not seem to be generally necessary to insert in such settlements any provisions enlarging such statutory powers. Forms of such provisions will be found in the following Precedents of Real Settlements, *post*, pp. 705 and 745.

(*t*) The effect of this proviso is merely to enable the husband or wife by will or codicil to deprive the other of them of her or his life interest to the extent of the income of the sum directed to be raised. For other forms of powers of withdrawing trust funds from settlement, see *ante*, pp. 550, 611.

appointments as last aforesaid shall be directed in that behalf: [*Power to appoint new trustees, ut ante*, p. 552 or p. 590; *trustee clauses, ante*, p. 552].

XXVIII. Settlement by One Deed of Freeholds, Copyholds, Leaseholds, and Personalty.

In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

XXIX. *Conveyance of* Freeholds *in* Trust for Sale; *the Proceeds of Sale to be held upon Trusts declared by a Deed of even Date* (*u*). *Powers of Leasing, &c.*

THIS INDENTURE (*x*), made the —— day of ——, 18—, Between [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part, WITNESSETH that, in consideration of a marriage which is intended shortly to be solemnized between the said [*husband*] and [*wife*], the said [*husband*], with the approbation of the said [*wife*], hereby grants, and as settlor conveys, unto the said [*trustees*] and their heirs, All [*parcels*], To hold the said hereditaments and premises unto the said [*trustees*] and their heirs, To the use of the said [*husband*], his heirs and assigns, until the said intended marriage, and thereafter To the use of the said [*trustees*], their heirs and assigns, Upon trust that the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor (*y*), or other the trustees or trustee for the time being of these presents (hereinafter called "the

Parties.

Testatum.

In consideration of marriage, settlor conveys freeholds,

Habendum,

to such uses as trustees shall appoint; in default, to them in fee.

Trust for sale.

(*u*) This mode of settling a small landed estate is the most convenient that can be adopted. The trust for sale will not be carried into effect unless it is found expedient to do so, and the effect of the settlement will, therefore, be the same as if the lands had been settled, as was sometimes done, directly to uses for the benefit of the parties and their children, with a power of sale, except that the property is, by virtue of the trust for sale, at once converted into personalty.

(*x*) Stamp, 10*s*.

(*y*) See as to the omission of the word "heirs," *ante*, p. 657, note (*q*).

XXIX. Conveyance of Freeholds in Trust for Sale.

said trustees or trustee"), shall, with the consent in writing of the said [*husband*] and [*wife*], or of the survivor of them, during their, his, or her lives or life, and after the decease of the survivor of them, at the discretion of the said trustees or trustee, sell the said hereditaments and premises, or any part thereof [either together or in parcels, by auction or private contract, and subject or not to any special or other stipulations as to title, evidence of title, or otherwise; with power to buy in all or any of the said hereditaments, or rescind or vary the terms of any contract relating thereto, and to re-sell without being responsible for loss, and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as they or he shall think fit (*z*)]: AND shall, from and after every or any such sale, stand possessed of the net monies arising therefrom, after payment thereout of the costs and expenses of and incident to the sale, or otherwise incurred in respect of the premises, upon the trusts, and with and subject to the powers and provisions, declared and contained concerning the same respectively by and in an indenture already prepared and intended to bear even date with, but to be executed immediately after the execution of these presents, and expressed to be made between the same parties as are parties hereto; AND

Declaration of trusts of proceeds of sale;

and of rents and profits till sale (*a*).

(*z*) The words in brackets may now be omitted, as these powers are now vested in all trustees for sale by virtue of sect. 35 of the Conveyancing and Law of Property Act, 1881, see *ante*, pp. 225, 226; as to sales subject to depreciatory conditions, see sect. 3 of the Trustee Act, 1888, *ante*, p. 227.

(*a*) The form of declaration of trusts here given seems to be advisable where the intention is that the property should not be sold shortly after the execution of the conveyance, or, in the case of a reversionary interest, after its falling into possession, but that it shall for some time to come be retained as land. In such a case, it may happen that, at some future time, "the person for the time being beneficially entitled to the income of the land until sale" (see sect. 63, *ante*, p. 229) may obtain leave of the Court under sect. 7 of the Act of 1884 (see *ante*, p. 230) to exercise the statutory power of sale of a tenant for life; and should he do so, it will be convenient that his life interest should appear on the face of the deed of conveyance, so as not to make the contemporary deed of settlement part of the title to the land and entitle a purchaser to an acknowledgment of his right to production of such last-mentioned deed. Where, however, an immediate sale is contemplated, the form of declaration of trust given in Precedent XXXI., *post*, p. 669, may be adopted, if preferred.

XXIX. Conveyance of Freeholds in Trust for Sale.

shall pay the rents and profits of the said hereditaments and premises until the same respectively shall be sold, to the said [*husband*] and his assigns during his life, and after his death to the said [*wife*] and her assigns during her life for her separate use, but so that she shall not during the said intended coverture have power to dispose of or charge such reversionary life interest by way of anticipation (*b*); And after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of the rents and profits of the said hereditaments and premises until the same shall be sold, upon such trusts and with and subject to such powers and provisions as are declared and contained concerning the same respectively by and in the said indenture intended to bear even date herewith: And it is hereby agreed and declared that, while the said hereditaments hereby assured, or any of them, shall remain unsold under the trust for sale hereinbefore contained, the said trustees or trustee may receive the rents and profits thereof, and may, at the cost of the said trust premises, repair, drain, improve, insure from fire, and manage the same, or such parts thereof as for the time being shall remain unsold; And also may adjust and determine in what proportions the expense of draining or other improvements shall be borne by the capital and income of the said trust premises respectively; And also may adjust, compound, and settle all accounts and claims respecting the same, and make such allowances to tenants and others in relation thereto as they or he shall think just; And also may exercise all or any of the powers of management lastly hereinbefore contained, either in person or by salaried agents, bailiffs, or deputies: Provided also that it shall be lawful for the said trustees or trustee, with the consent of the said [*husband*] and [*wife*], and the survivor of them, and after the death of the survivor of them at the discretion of the said trustees or trustee, to let or demise the said hereditaments hereby assured or any part thereof which for the time being shall remain unsold, for building, repairing, or improving purposes, for any term or terms not exceeding ninety-nine years, or for mining purposes for any term or terms not exceeding forty years, and for any

Power to manage (*c*) (*short form*);

power to delegate.

Power to grant building and improving leases;

mining leases, and husbandry leases (*short form*).

(*b*) As to the propriety of inserting this restraint on anticipation, see *ante*, p. 295.

(*c*) For fuller powers of management, leasing, &c., see Precedent XXXIII., *post*, pp. 681, *et seq.*

XXIX. Conveyance of Freeholds in Trust for Sale.

consideration or considerations, either by way of fine, premium, rent, royalty, or otherwise, which they or he shall consider fair and adequate, or for cultivation, use, or occupation, at the best rent for the time being obtainable, without taking any premium or fine, either from year to year or for any term not exceeding twenty-one years from the time of letting, and with, under, and subject to such covenants and conditions as the said trustees or trustee shall think proper; but so that every lease shall take effect in possession or within —— calendar months from the granting thereof, and shall be executed in counterpart by the lessee or lessees, and that any premium or fine shall be treated as if it were proceeds of the sale of the hereditaments in respect of which it is received (*c*): PROVIDED LASTLY, and it is hereby agreed and declared, that the powers of appointing new trustees of these presents, as and when occasion shall arise, shall be vested in the said [*husband*] and [*wife*] jointly during their joint lives, and in the survivor of them during his or her life.

Power to appoint new trustees.

IN WITNESS, &c.

XXX. *DECLARATION of* TRUSTS *of* MONEY *to arise from the* SALE *of* FREEHOLDS *conveyed by Deed of even Date for the Benefit of the intended Husband and Wife and the Issue of the Marriage.* COVENANT *to* SETTLE AFTER-ACQUIRED PROPERTY *of the Wife.*

THIS INDENTURE (*d*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS a marriage is intended shortly to be solemnized between the said [*husband*] and [*wife*]: AND WHEREAS, in pursuance and

Parties.

Recitals: of intended marriage;

(*c*) If desired a proviso may be here inserted giving lessees under building leases an option to purchase the reversion: if so, say,

"PROVIDED ALWAYS that any building lease and any agreement for a building lease, under the powers of leasing hereinbefore contained, may," &c. [*and continue as in the Settled Land Act*, 1889 (52 *& 53 Vict. c.* 36), *sect.* 2].

(*d*) Stamp 10*s.* in respect of the proceeds of the intended sale, and 10*s.* in respect of the covenant to settle after-acquired property.

XXX. Declaration of Trusts of Proceeds of Sale of Freeholds.

part-performance of an agreement entered into upon the treaty for the said intended marriage, the said [*husband*] has by an indenture bearing even date, but executed before the execution of these presents, and made between the same parties as are parties hereto, assured and conveyed certain freehold lands and hereditaments situate in the parish of ——, in the county of ——, and therein particularly described, to the use of the said [*husband*], his heirs and assigns, until the said intended marriage, and thereafter to the use of the said [*trustees*], their heirs and assigns, upon trust to sell the same as therein mentioned, and to stand possessed, from and after such sale, of the net monies to arise therefrom, and from and after the death of the survivor of them the said [*husband*] and [*wife*], of the rents and profits of the said hereditaments until the same should be sold, upon such trusts and subject to such powers and provisions as should be declared and contained concerning the same respectively by and in an indenture of even date therewith therein referred to, being these presents; AND WHEREAS upon the treaty for the said intended marriage it was agreed that these presents should contain such covenant or agreement as is hereinafter contained for settling any property of or to which the said [*wife*] may be or become entitled at the time of such marriage or during the said intended coverture, except as hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said agreement in this behalf, and in consideration of the said intended marriage, it is hereby agreed and declared that the said [*trustees*], their executors, administrators, and assigns, shall stand possessed of the net monies to arise from the sale under the trust for sale contained in the hereinbefore-recited indenture of even date herewith of the said lands and hereditaments thereby assured, or any part thereof, UPON TRUST that the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall, with the consent in writing of the said [*husband*] and [*wife*] during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor, at the discretion of the said trustees or trustee, invest the same net monies, as and when the same shall be received in the names or name, &c. [*investment clause, ut ante, pp.* 545, 554, 558, *or* 562;

of conveyance of lands in trust for sale;

of agreement for settlement of wife's after-acquired property.

First *testatum.*

Declaration of trusts of proceeds of sale of lands:

trust for investment;

XXX. Declaration of Trusts of Proceeds of Sale of Freeholds.

power to vary investments, ante, p. 545 (e)]: AND IT IS HEREBY AGREED AND DECLARED, that the said trustees or trustee shall pay the income of the said trust premises and the investments thereof unto the said [*husband*] during his life; And after his death to the said [*wife*], if she shall survive him, for her separate use, but so that she shall not have power to dispose of or charge such reversionary life interest by way of anticipation; And from and after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of the said trust premises and investments, and the income thereof, IN TRUST, &c. [*usual trusts in favour of issue, ante*, pp. 546, 547; *hotchpot clause and power of advancement*, p. 547]: AND IT IS HEREBY AGREED AND DECLARED, that if there shall be no child of the said intended marriage who, being a son, shall attain the age of twenty-one years, or being a daughter, shall attain that age or marry, then, subject to the trusts and powers hereinbefore declared and contained, or by law vested in the said trustees or trustee, the said trustees or trustee shall stand possessed of the said trust premises and investments, and the income thereof, or so much thereof respectively as shall not have been paid or applied under any such trusts or powers, IN TRUST for the said [*husband*] absolutely; PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall from and after the death of the survivor of them the said [*husband*] and [*wife*] (*f*), pay and apply the rents and profits of the said lands and hereditaments assured by the said indenture of even date herewith until sale thereof, or of the part or parts thereof for the time being remaining unsold, to the person or persons, upon the trusts, and for the purposes, to, upon, and for whom, or which, the income of the investments hereinbefore directed to be made of the net monies to arise from the sale thereof would have been payable or applicable if such sale and investment had actually been made: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance of the said agreement in this behalf, and for the consideration aforesaid, it is

trusts of income for husband for life, remainder for wife for life;

trusts in favour of issue;

ultimate trust in default of children for husband absolutely.

Declaration of trusts of rents and profits till sale.

Second *testatum*.

Covenant to settle wife's after-acquired property.

(*e*) A power to invest trust funds in the purchase of land may be here inserted if desired; for a form of such power, see *ante*, p. 586.

(*f*) The trusts of the rents and profits during the lives of the husband and wife and the life of the survivor are declared by the conveyance of even date: see *ante*, p. 662.

hereby agreed and declared, and the said [*wife*] hereby covenants, &c. [*continue covenant for settlement of after-acquired property, ut ante, p.* 549, *and add at the end of the declaration of trusts*]; SAVE and except that the said [*wife*] shall take the first life interest, without power of anticipation, in the income of any property which shall become vested in the said trustees or trustee under or by virtue of the covenant for settlement thereof hereinbefore contained, and that after her death the said [*husband*], if he shall survive her, shall be entitled to such income during his life, and that if there shall be no child of the said intended marriage who, being a son, shall attain the age of twenty-one years, or being a daughter, shall attain that age or marry, then, subject to the trusts and powers hereinbefore declared and contained, or by law vested in the said trustees or trustee, the said trustees or trustee shall stand possessed of any property which shall have become vested in them under or by virtue of such covenant, IN TRUST, &c. [*ultimate trusts in favour of wife, ut ante,* pp. 548, 549; *power to appoint new trustees and trustee clauses, ante,* p. 552].

XXX. **Declaration of Trusts of Proceeds of Sale of Freeholds.**

Proviso as to income of after-acquired property.

Ultimate trusts of after-acquired property.

IN WITNESS, &c.

XXXI. *CONVEYANCE on* MARRIAGE *of an* EQUITABLE UNDIVIDED SHARE *of* FREEHOLDS *in* REMAINDER *expectant on determination of a Life-estate, to trustees upon* TRUST *for* SALE. POWER *of* PARTITION, *and to raise* EQUALITY MONEYS *by* MORTGAGE. PROVISO *as to* COSTS *of* ASSURANCES, *&c.*

THIS INDENTURE (*g*), made the —— day of ——, 18—, BETWEEN [*intended wife*], of, &c., of the first part; [*intended husband*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS [*recite intended marriage, ante,* p. 664]; AND WHEREAS, under the will of [*testator*], late of ——, in the county of ——, deceased, dated the —— day of ——, 18—, and duly proved on or about the —— day of ——, 18—, in the Principal Registry of the Probate Division of

Parties.

Recitals: of intended marriage; of equitable title to share of freeholds under will and appointment.

(*g*) Stamp 10*s*.

XXXI. **Conveyance of Wife's Equitable Reversionary Interest in Real Estate upon Trust for Sale.**

Her Majesty's High Court of Justice, and a deed poll of appointment dated the —— day of ——, 18—, under the hand and seal of [*wife's father*], of, &c., the father of the said [*wife*], she the said [*wife*] is beneficially entitled for an estate of inheritance in fee simple in remainder expectant on the death of the said [*wife's father*], to one equal undivided fifth part or share of and in certain freehold lands and hereditaments devised by the said will unto [*trustees of will*], upon the trusts declared by the said will, in favour of the said [*wife's father*] and his children by [*wife's mother*], his late wife; AND WHEREAS, upon the treaty for the said intended marriage, it was agreed, amongst other things, that the said undivided fifth part or share to which the said [*wife*] is entitled in expectancy as aforesaid of and in the said lands and hereditaments should be conveyed unto the said [*trustees*], their heirs and assigns, upon the trusts hereinafter declared concerning the same: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said intended marriage, the said [*wife*], with the approbation of the said [*husband*], hereby grants, and as settlor conveys unto the said [*trustees*], their heirs and assigns, ALL THAT the one equal undivided fifth part or share to which under the said will of the said [*testator*] and the said deed poll of appointment of the —— day of ——, 18—, she the said [*wife*] is beneficially entitled in immediate expectancy upon the decease of the said [*wife's father*] as aforesaid, of and in all those the said lands and hereditaments devised by the said will unto the said [*trustees of will*], in trust for the said [*wife's father*] and his children by the said [*wife's mother*], his late wife as aforesaid, TO HOLD the said one undivided fifth part or share, and all other the premises hereinbefore granted and conveyed, UNTO AND TO THE USE of the said [*trustees*], their heirs and assigns, UPON THE TRUSTS hereinafter declared of the same, that is to say, IN TRUST for the said [*wife*], her heirs and assigns, until the intended marriage, and thereafter UPON TRUST that they the said [*trustees*], and the survivors and survivor of them, and the executors or administrators (*h*) of such survivor (hereinafter called "the said trustees or trustee"), shall at any time or times hereafter,

Testatum.

Grant to trustees.

Parcels.

Habendum.

(*h*) As to the omission of the word "heirs," see *ante*, p. 657, note (*q*).

XXXI. Conveyance of Wife's Equitable Reversionary Interest in Real Estate upon Trust for Sale.

either during the life of the said [*wife's father*], or after his decease, and either alone or in conjunction with the persons or person for the time being entitled to the other parts or shares of and in the said estates and hereditaments, but with the consent in writing of the said [*husband*] and [*wife*], or the survivor of them, during their joint lives and the life of such survivor, And after the death of such survivor then at the discretion of the said trustees or trustee, sell and dispose of the said part or share and premises hereinbefore expressed to be hereby granted, And shall stand possessed of the money to arise from any such sale as aforesaid, but subject to the payment of all costs and expenses relating to such sale or sales, or the execution of any of the trusts or powers herein declared or contained, And also of the rents, issues, and profits of the said part or share and premises, after the death of the said [*wife's father*], so long as the same shall remain unsold (but subject to the payment of all taxes, rates, expenses of repair and insurance, and other outgoings in respect thereof), upon such trusts as are or shall be declared of the same respectively in and by an indenture already prepared, and intended to bear even date with these presents, and to be made between the said [*husband*], of the first part, the said [*wife*], of the second part, the said [*wife's father*], of the third part, and the said [*trustees*], of the fourth part: PROVIDED ALWAYS, and it is hereby agreed and declared, that at any time or times after the solemnization of the said intended marriage, and after the decease of the said [*wife's father*], so long as the said part or share and premises shall remain unsold, it shall be lawful for the said trustees or trustee, with the consent in writing of the said [*husband*] and [*wife*], during their joint lives, and of the survivor of them during his or her life, and after the decease of such survivor then at the discretion of the said trustees or trustee, to demise or concur with the persons or person for the time being entitled to the other parts or shares of and in the said hereditaments and premises devised by the said will in demising the said part or share and premises hereby granted [*continue power of leasing, ut ante, p.* 663]: PROVIDED ALWAYS, and it is hereby further agreed and declared, that

Trust of sale monies, and of rents till sale (*i*).

Power of leasing till sale.

Power of partition.

(*i*) As to forming declarations of trust of sale monies, and of rents and profits till sale, see *ante*, p. 662, note (*a*).

XXXI. Conveyance of Wife's Equitable Reversionary Interest in Real Estate upon Trust for Sale.

at any time or times after the solemnization of the said intended marriage, either during the life of the said [*wife's father*] or after his death, so long as the said part or share and premises hereby granted shall remain unsold, it shall be lawful for the said trustees or trustee, with the consent in writing of the said [*husband*] and [*wife*], or the survivor of them, during their joint lives, and the life of such survivor, and after the decease of such survivor then at the discretion of the said trustees or trustee, to concur with the persons or person for the time being entitled to the other parts or shares of and in the said lands and hereditaments in making a partition thereof respectively, or any of them, and for that purpose to enter into, do, make, and execute, all such contracts, arrangements, acts, deeds, things, conveyances, and assurances whatsoever as to them or him shall seem fit, and either to receive or pay any sum or sums of money for equality of partition; And that upon every such partition the hereditaments which shall be received in lieu of the said part or share hereinbefore granted and released, or expressed so to be, shall be conveyed or limited to the use of the said [*trustees*], or other the trustees or trustee for the time being of these presents, their heirs and assigns, and shall be held by the said trustees or trustee upon and for such and the same trusts, and subject to and with such and the same powers (except the said power of partition) as are hereinbefore expressed and contained or referred to concerning the said undivided part or share and premises hereby granted, or as near thereto as the deaths of the parties or other circumstances will admit of; And it is hereby further agreed and declared, that if, upon any such partition as aforesaid, any sum or sums of money shall be received for equality of partition, the same shall be considered as money arising under the trusts hereinbefore declared for the sale of the said part or share and premises, and be held and disposed of accordingly; And further that if upon any such partition as aforesaid any sum or sums of money shall be payable for equality of partition, such sum or sums of money may be raised by mortgage of the whole or any part or parts of the hereditaments which shall be taken in severalty upon such partition; and that such mortgage and the interest thereon may afterwards be discharged out of the monies to arise under the trusts hereinbefore declared, and out of the rents,

Trusts of equality monies;

may be raised by mortgage.

issues, and profits of the said part or share and premises; [AND IT IS HEREBY AGREED AND DECLARED, that the costs and expenses of all such further acts and assurances as shall be required to be made or executed at any time or times before and until sale and conveyance of the said part or share and premises to a purchaser or purchasers thereof, shall be paid out of the rents, issues, and profits of the said part or share and premises, and that the costs and expenses of all other such further acts and assurances as aforesaid shall be paid by the person or persons requiring the same:] [*power to appoint new trustees, ante*, p. 664].

XXXI. **Conveyance of Wife's Equitable Reversionary Interest in Real Estate upon Trust for Sale.**

Declaration as to expense of further assurances.

IN WITNESS, &c.

XXXII. *SETTLEMENT on Marriage of a* REVERSIONARY INTEREST *of the* HUSBAND *under a prior Settlement and Appointment, and of the* PROCEEDS *of* SALE *of an* EQUITABLE REVERSIONARY INTEREST *of the* WIFE *conveyed by Deed of even Date.* COVENANT *by* WIFE'S FATHER *to* PAY *an* ANNUITY *during his Life* (*k*).

THIS INDENTURE (*l*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; [*wife's father*], of, &c., of the third part; and [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the fourth part: WHEREAS [*recite intended marriage, ante*, p. 664]; AND WHEREAS under an indenture dated the —— day of ——, 18—, and made or expressed to be made between [*parties*], and a deed poll of appointment dated the —— day of ——, 18—, under the hand and seal of the said [*husband's father*], and another deed poll of appointment dated the —— day of ——, 18—, under

Parties.

Recitals: of intended marriage; of title to sum under marriage settlement and deed of appointment;

(*k*) Notice of this settlement should be given to the trustees of the settlement and will under which the several reversionary interests are derived.

(*l*) Stamp 5*s.* per 100*l.*, or part of 100*l.* in respect of the reversionary interests brought into settlement, and 2*s.* 6*d.* per 5*l.* on the amount of the annuity secured by the covenant.

XXXII. Declaration of Trusts of Proceeds of Sale of Equitable Reversionary Interest in Real Estate.

the hand and seal of the said [*husband's father*], the said [*husband*] is absolutely entitled in remainder expectant upon the death of the said [*husband's father*] to the sum of £——: AND WHEREAS under the will of [*testator*], late of ——, in the county of ——, dated, &c., and proved, &c., and a deed poll of appointment dated the —— day of ——, 18—, under the hand and seal of the said [*wife's father*], the said [*wife*] is beneficially entitled for an estate of inheritance in fee simple in remainder expectant upon the death of the said [*wife's father*] to one equal undivided fifth part or share of and in certain freehold lands and hereditaments devised by the said will unto [*trustees of will*], in trust for the said [*wife's father*] and his children by [*wife's mother*], his late wife: AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said sum of £——, to which the said [*husband*] is entitled in expectancy as aforesaid, should be assured unto the said [*trustees*], their executors, administrators, and assigns, upon the trusts hereinafter declared, and also that the said part or share to which the said [*wife*] is entitled in expectancy as aforesaid of and in the said lands and hereditaments should be conveyed unto the said [*trustees*], their heirs and assigns, Upon trust to sell the same and to stand possessed of the monies to arise by such sale, and also of the rents and profits of the said part or share and premises so long as the same should remain unsold, Upon the trusts hereinafter declared: And also that the said [*wife's father*] should enter into such covenant as is hereinafter contained for the payment to the said [*trustees*], their executors, administrators, and assigns, during his life so long as the said [*wife*], or in case of her decease then so long as the said [*husband*] and any child or children of the said intended marriage shall be also living of a clear annual sum of £—— upon the trusts hereinafter declared of the same: AND WHEREAS in pursuance of the said agreement by an indenture bearing even date with but executed before the execution of these presents, and made [*here recite last deed*]: NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said agreement, and in consideration of the said intended marriage, the said [*husband*], with the approbation of the said [*wife*], hereby assigns, and as settlor conveys unto the said [*trustees*], their executors, administrators, and assigns, ALL THAT the said sum of £—— to which under the said inden-

equitable title to a share of freeholds under a will and appointment;

agreement to settle sum and share of freeholds.

Conveyance of freeholds in trust for sale by deed of even date.

Testatum.

Assignment of sum by husband.

XXXII. Declaration of Trusts of Proceeds of Sale of Equitable Reversionary Interest in Real Estate.

ture of settlement of the —— day of ——, 18—, the several deeds poll of the —— day of ——, 18—, and the —— day of ——, 18—, respectively, he the said [*husband*] is absolutely entitled in remainder expectant upon the decease of [*husband's father*] as aforesaid, To HOLD the said sum of £—— and premises hereinbefore assigned unto the said [*trustees*], their executors, administrators, and assigns, IN TRUST for the said [*husband*], his executors, administrators, and assigns, until the said intended marriage, and after the solemnization thereof, UPON THE TRUSTS hereinafter declared of the same; And it is hereby agreed and declared that from and after the said intended marriage the said [*trustees*], their executors, administrators, and assigns respectively, shall stand and be possessed of the said sum of £—— and premises hereinbefore assigned: And also of and in the money to arise by any sale or sales which may be made under the trusts of the said indenture of even date herewith of the part or share therein comprised, but subject to the payment of all costs and expenses relating to such sale, or the execution of any of the trusts or powers therein declared or contained, UPON TRUST that the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall, &c. [*trust for investment, ante*, p. 545; *investment clause, ante*, pp. 545, 554, 558, or 562; *power to vary investments, ante*, p. 545]: AND IT IS HEREBY AGREED and declared that the said trustees or trustee shall stand possessed of the said trust premises, as and when the same shall be received by them or him, and the investments for the time being representing the same respectively and the income thereof, UPON TRUST that the said trustees or trustee shall pay the said income to the said [*husband*] during his life, and from and after his death to the said [*wife*] for her separate use, but so that she shall not have power to dispose of or charge such reversionary life interest by way of anticipation: And from and after the death of the survivor of them the said [*husband*] and [*wife*] shall stand possessed of the said trust premises and investments and the income thereof, IN TRUST, &c. [*usual trusts in favour of issue of marriage; hotchpot clause; power of advancement, ante*, pp. 546, 547]: AND it is hereby agreed that if there shall be no child of the said intended marriage who, being a son, shall

Habendum.

Trust for husband till marriage.

Trust of sum and sale monies.

Trusts of income.

Trusts for issue.

Ultimate trusts.

XXXII. Declaration of Trusts of Proceeds of Sale of Equitable Reversionary Interest in Real Estate.

attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then subject to the trusts and powers hereinbefore declared and contained, or by law vested in the said trustees or trustee, they or he the said trustees or trustee shall stand possessed of the said trust premises and investments, or so much thereof as shall not have been paid or applied under any such trusts or powers, as to the sum of £——, UPON TRUST to pay the same to the said [*husband*], his executors, administrators, or assigns, for his and their absolute use and benefit, And as to the residue of the said trust premises and investments and the income thereof, IN TRUST, &c. [*ultimate trusts in favour of wife, ut ante*, p. 548]: PROVIDED ALWAYS, and it is hereby agreed and declared, that from and after the decease of the said [*wife's father*] the said trustees or trustee shall pay and apply the rents, issues, and profits of the said parts or shares and premises comprised in the said indenture of even date therewith so long as the same shall remain unsold, but subject to the payment of all rates, taxes, expenses, repairs, and insurance or other outgoings in respect thereof to such and the same person or persons, and in such and the same manner as the interest of the money to arise by the sale of the same premises would for the time being be payable to or applicable by virtue of these presents in case the said part or share and premises were then actually sold: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance of the said agreement in this behalf, and for the consideration aforesaid, the said [*wife's father*], with the privity and approbation of the said [*husband*] and [*wife*], hereby covenants that if the said intended marriage shall be solemnized, he the said [*wife's father*] will during the life of him the said [*wife's father*], and so long as the said [*husband*] and [*wife*], or the survivor of them, or any issue of the marriage shall be living, pay to the said trustees or trustee the yearly sum of £——, by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year, but to be deemed to accrue due from day to day, the first of such payments to be made on such of the said days as shall happen next after the said intended marriage: AND IT IS HEREBY AGREED AND DECLARED, that the said trustees or trustee shall from time to time, while the said yearly sum of £—— shall be payable, pay and apply the same to the person or persons, for the purposes, and in the manner, to whom, and

Rents till sale to be applied as sale monies.

Second *Testatum.*

Covenant by wife's father to pay an annuity during his life.

Trusts of annuity.

for, and in which, the income of the said trust premises and investments hereby settled would for the time being be payable or applicable under or by virtue of the trusts, powers, and provisions hereinbefore declared and contained concerning the same: [*power to appoint new trustees, trustee clauses, ante*, p. 552].

XXXII. Declaration of Trusts of Proceeds of Sale of Equitable Reversionary Interest in Real Estate.

IN WITNESS, &c.

XXXIII. *CONVEYANCE on* MARRIAGE, *of* FREEHOLDS, COPYHOLDS, *and* LEASEHOLDS *belonging to the Intended Husband, upon* TRUST *for* SALE; POWER *to* SELL *for* FEE FARM RENTS. *Extensive* POWERS *of* PARTITION, EXCHANGE, ENFRANCHISEMENT, MANAGEMENT, LEASING, *&c.* (*m*).

THIS INDENTURE (*n*), made the —— day of ——, 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; [*trustee*], of, &c. [*trustee*], of, &c., and [*trustee*], of, &c., of the third part: WHEREAS [*recite intended marriage, ante*, p. 544]: AND WHEREAS the said [*husband*] is seised of or entitled to the several messuages, lands, and hereditaments particularly described in the first schedule hereunder written for an estate of inheritance in fee-simple in possession, and is also seised of or entitled to the lands and hereditaments particularly described in the second schedule hereunder written, to him and his heirs, according to the customs of the several manors mentioned in the same schedule whereof such last-mentioned lands and hereditaments are respectively holden, and subject to the rents and service therefor due and of right accustomed respectively: and is also possessed of or entitled to the several messuages

Recitals: of intended marriage; of husband's title to lands described in schedules;

(*m*) In this Precedent large powers are given to the trustees of dealing with the property until it is sold: see *ante*, p. 228. Such powers were formerly often inserted not only in conveyances but also in real settlements; but the necessity for their insertion in the latter class of instruments is in great measure superseded by the provisions of the Settled Land Acts. It has been thought well to collect in this place a set of extensive powers of this nature, but it is obvious that it will seldom be necessary to insert them all in the same conveyance.

(*n*) Stamp 10*s*.

XXXIII. **Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.**

and lands, particularly described in the third schedule hereunder written, for the residues of the several terms therein respectively created by the several leases which and the mesne assignments thereof respectively, are also mentioned in such last-mentioned schedule, and are therein set opposite to the properties to which such leases and assignments relate respectively, and at the yearly rents therein mentioned respectively:

of agreement for conveyance on trust for sale.

AND WHEREAS, upon the treaty for the said intended marriage it was agreed that the said freehold, copyhold, and leasehold premises should be assured unto the said trustees, their heirs, executors, administrators and assigns respectively in manner hereinafter appearing upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same respectively: NOW

First *testatum.*

Grant of freeholds.

THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said intended marriage, the said [*husband*], with the approbation of the said [*wife*], hereby grants, and as settlor conveys unto

Parcels.

the said [*trustees*] and their heirs, ALL THAT and those the messuage or dwelling-house called ——, with the stables, outbuildings, gardens and pleasure-grounds thereto belonging, and the several manors, messuages or dwelling-houses, farms, lands and hereditaments situate in the parishes of —— and ——, in the county of ——, and particularly described in the

Habendum.

Upon trusts to be declared.

first schedule hereunder written, TO HOLD all the premises hereby granted unto the said [*trustees*] and their heirs TO THE USE of the said husband and his heirs until the said intended marriage, and thereafter, TO THE USE of the said [*trustees*], their heirs and assigns, UPON THE TRUSTS, and with and subject to the powers and provisions hereinafter declared concerning the same: AND THIS INDENTURE ALSO WITNESSESH, that in further pursuance of the said agreement,

Second *testatum.*

Covenant to surrender copyholds.

and for the consideration aforesaid, the said [*husband*] hereby covenants with the said [*trustees*], that in case the said intended marriage shall be solemnized, that he, the said [*husband*] or his heirs will forthwith, at his or their own cost, surrender into the hands of the lords or ladies of the manors of which the same are respectively holden, and according to the several customs of such manors respectively, and he also hereby as settlor conveys ALL THOSE messuages, lands, and hereditaments situate in the parishes of —— and —— aforesaid, and particularly described in the second schedule hereunder

written, To THE USE of the said [*trustees*], their heirs and assigns, according to the several customs of the said manors, and at and under the several rents, fines, suits, and services therefor due, and of right accustomed respectively, to be held UPON THE TRUSTS, and with and subject to the powers and provisions hereinafter declared and contained concerning the same: AND the said [*husband*] hereby declares that from and after the said intended marriage, and until the said hereditaments and premises hereby covenanted to be surrendered, shall be surrendered pursuant to the covenant in that behalf hereinbefore contained, he, the said husband and his heirs, will stand possessed thereof in trust for the said [*trustees*], their heirs and assigns: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*husband*] hereby assigns, and as settlor conveys unto the said [*trustees*], all those the several messuages and pieces or parcels of land situate in the parishes of —— and —— aforesaid, particularly described in the third schedule hereunder written: To HOLD all the premises hereby assigned unto the said [*trustees*], their executors, administrators and assigns, for the residues of the several terms therein respectively created by the several indentures of lease which in the third schedule hereunder written are respectively set opposite to the properties to which the same respectively relate, subject to the several rents and covenants on the part of the lessees and to the conditions reserved by and contained in the said leases respectively, IN TRUST for the said [*husband*], his executors, administrators, and assigns, until the said intended marriage and afterwards, UPON THE TRUSTS, and with and subject to the powers and provisions hereinafter declared and contained concerning the same: AND IT IS HEREBY AGREED AND DECLARED, that the said [*trustees*], their heirs, executors, administrators and assigns respectively, shall, from and after the said intended marriage, stand seised and be possessed of the freehold, copyhold and leasehold hereditaments and premises hereby granted, covenanted to be surrendered, and assigned respectively UPON TRUST that the said [*trustees*], or the survivors or survivor of them, or the heirs, executors or administrators (*o*) of such sur-

XXXIII. **Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.**

Declaration of trusts of copyholds till surrender.

Third *testatum*.

Assignment of leaseholds.

Habendum.

Declaration of trust for sale of lands assured.

(*o*) As to the insertion of the word "heirs" in this place, see *ante*, p. 657, note (*q*).

XXXIII. **Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.**

vivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall, at the request in writing of the said [*husband*] and [*wife*], or the survivor of them, during their, his or her lives or life, and after the death of such survivor at the discretion of the said trustees or trustee, sell the said freehold, copyhold and leasehold hereditaments and premises hereby granted, covenanted to be surrendered, and assigned respectively, or any part thereof respectively (*p*): PROVIDED ALWAYS that it shall be lawful for the said trustees or trustee, on any sale of any of such hereditaments and premises as may be subject to an entire fee farm rent or perpetual rentcharge, or comprised in any lease at an entire yearly rent to apportion any such fee farm rent, rentcharge, or yearly rent, and to make such arrangements and provisions for securing payment by the purchaser or purchasers of the apportioned part or parts thereof, and for the performance and observance of the covenants and conditions of the grant or lease affecting the several parts of such hereditaments and premises as aforesaid, and for giving and receiving such indemnities as may seem proper or expedient with regard to the payment of, and liabilities in respect of such fee farm rents, rentcharges, and yearly rents, &c. [*Declaration of trusts of proceeds of sale, and of rents till sale, ante*, p. 662]: PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee, at such request or at such discretion as aforesaid, to exchange (*q*) any of the hereditaments and premises hereby granted, covenanted to be surrendered and assigned respectively for other freehold or copyhold hereditaments in England or Wales, held in fee-simple, for leasehold messuages or lands, or held for an absolute unexpired term of not less than ninety-nine years, and upon any such exchange to pay or receive money either in gross or by way of rent for equality of exchange; any property so taken in exchange to be conveyed, as nearly as may be, to the uses and upon the trusts affecting the hereditaments so given in exchange immediately before such exchange; and to enfran-

Power for trustees to apportion rents.

Powers for trustees to exchange;

to enfranchise;

(*p*) As to its being no longer necessary to empower trustees to sell together or in parcels, &c., see *ante*, p. 225.

(*q*) This includes a power to pay or receive money for equality of exchange: *Bartram* v. *Whichcote*, 6 Sim. 86.

XXXIII. Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.

chise any copyhold or customary hereditaments held of any manor, for the time being subject to the trusts of these presents: with or without a re-grant of any rights of common, and other rights, liberties, or privileges appendant or appurtenant to or held or enjoyed with such hereditaments, and with or without a reservation of all or any of the mines and minerals thereunder, and for such consideration in money either in gross or by way of rent, or for such consideration in land, or partly for one and partly for another or others of such considerations and generally upon such terms and in such manner as the said trustees or trustee shall think fit: AND also to grant to any copyholder or customary tenant of any manor for the time being subject to the trusts of these presents, such licence as the said trustees or trustee shall think proper to demise or lease all or any part of the messuages, lands, tenements and hereditaments holden by such copyholder or tenant, or forming part of the waste of such manor for any term of years not exceeding the terms following respectively, that is to say, in the case of a demise or lease for building, repairing or improving purposes, the term of ninety-nine years, and in the case of any other demise or lease the term of twenty-one years, every such term to commence and take effect in possession or within six calendar months from the date of such lease, and to build upon or otherwise improve any premises so holden or forming part of such estate as aforesaid, and for such purposes to annex adjacent waste land, pull down messuages or buildings, make roads and streets, and execute and do any necessary or convenient works and things; and also on granting any such licence, to determine the annual value during the term therein mentioned, in respect of which fines, fees and other payments are to be assessed, and the amount of such fines, fees or payments, and so that every such licence shall be entered on the court rolls of the manor to which the same shall apply: PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee, at such request or at such discretion as aforesaid, to sell either by way of conveyance of the fee absolute or customary, or by way of demise for a term of years of any duration, all or any part of the freehold, copyhold, and hereditaments hereby granted and covenanted to be surrendered upon trust for sale respectively in consideration of fee farm rents or perpetual rentcharges, or of the best yearly rents which can for the time

to grant licences to copyholders;

to sell for fee farm rents, &c.

XXXIII. Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.

being be reasonably obtained, such fee farm rents, rentcharges, and other rents respectively to be issuing or reserved out of and secured upon the hereditaments sold, or any part thereof, either alone or together with other hereditaments, or partly in consideration of such fee farm rents, rentcharges, or other rents, and partly in consideration of a gross sum of money; And it is hereby declared that any such conveyances or demises may, at the discretion of the said trustees or trustee, be made subject or not subject to any covenants or conditions for building upon or improving the lands sold or demised, and with or without power for the purchasers or lessees respectively to redeem any fee farm rent or rentcharge, or to purchase the reversion of and in any lands demised, and with and subject to any other covenants, conditions, or provisions, and that the said fee farm rents, rentcharges, and other rents shall be payable, reserved, or secured in such manner as the said trustees or trustee shall think proper; Provided also that the said trustees or trustee shall, as soon as conveniently may be after any such sale or demise, sell and convert into money every such fee farm rent or rentcharge as aforesaid, and the rents and reversion of and in all hereditaments so sold or demised as last aforesaid, and shall hold the net proceeds of any such sale upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained of and concerning the proceeds of sale of the lands, hereditaments, and premises hereby assured in trust for sale, and shall hold the said fee farm rents, rentcharges, and other rents, until sale, upon the trusts, and with and subject to the powers and provisions declared and contained concerning the income of the same proceeds of sale by and in the said indenture of even date with these presents hereinbefore referred to: PROVIDED ALWAYS that it shall be lawful for the said trustees or trustee, at such request or at such discretion as aforesaid, to lay out all or any part of the hereditaments and premises hereinbefore assured on trust for sale, for building purposes, and to appropriate and lay out any parts thereof, as they or he shall think fit, for streets, roads, ways, squares, gardens, or other open spaces, and to build, erect, lay down, make and execute upon, in, or under any parts of the same hereditaments and premises any messuages, buildings, sewers, drains, gas pipes, water pipes, water courses, fences, and other works necessary to or in connection with building purposes: PROVIDED ALWAYS, and it is hereby agreed

Power for trustees to build, appropriate streets, &c.

Power to

XXXIII. Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.

and declared, that it shall be lawful for the said trustees or trustee after the said intended marriage, and until sale of all the freehold, copyhold, and leasehold hereditaments and premises hereinbefore granted, covenanted to be surrendered, and assigned respectively on trust for sale, to receive the rents and profits and manage or superintend the management of the same premises, or the unsold part thereof, and to make allowances and arrangements and settle accounts to or with tenants, and to accept surrenders of leases or tenancies, and to cut timber for repairs or sale, and to open and work mines, quarries, and brickfields, and to erect, repair, pull down and rebuild houses and buildings, and to make drains, roads, and fences, and to improve the said premises or any part thereof, and to insure buildings against damage by fire, and pay out of such rents and profits, or out of the income of any capital monies which shall for the time being be in their or his hands under the trusts of these presents, all or any charges of ground or other rents, annual sums, and all other outgoings, and the costs of and incident to the exercise of such powers of management and improvement, and generally to do all such acts and things in relation to the premises as they might do if they or he were the absolute owners or owner thereof, without being accountable for any loss which may be occasioned thereby: PROVIDED, nevertheless, that the said trustees or trustee may, from time to time, during such period or periods, and upon such terms or conditions as they or he shall think fit, authorise and empower, or permit and suffer the said [*husband*] or the said [*wife*], or any other person or persons interested in or under the said indenture of even date herewith, to receive such rents and profits, and to exercise all the powers of management hereinbefore given to the said trustees or trustee, without being accountable for any loss that may be occasioned thereby: PROVIDED ALWAYS, that it shall be lawful for the said trustees or trustee, from time to time during the continuance of the trusts hereby created, in their absolute discretion, to appoint, retain, employ and dismiss such agents, bailiffs, stewards, receivers, clerks, accountants, or other persons to aid and assist them in the care and management of the said premises or any part thereof, and in receiving and paying the rents, income, and produce thereof, or any part thereof, or otherwise in the performance and execution of the several trusts and purposes hereinbefore declared concerning the said premises, as to the said trustees or trustee may seem best,

trustees to manage and receive rents until sale of lands;

to allow *cestuis qui trusts* to receive rents, &c.;

to employ agents, &c.;

XXXIII. Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.

and also to pay or allow to all such agents, bailiffs, stewards, receivers, clerks, accountants, and other persons so appointed, retained, and employed from time to time, such salary or salaries, allowances, or other compensation, as the said trustees or trustee shall in their or his discretion think fit: PROVIDED ALSO that the said trustees or trustee shall have full power to determine whether any and what part of the produce of timber, mines, minerals, quarries or brickfields shall be treated as capital or income respectively; and any part of such produce which shall be so determined to be of the nature of capital, shall be held and applied by the said trustees or trustee as if the same were monies arising from a sale under the trust for sale hereinbefore contained;

to determine questions;

to raise money for payment of charges, &c.

And also power to raise from time to time, by mortgage, or sale under the trust for sale hereinbefore contained, or otherwise out of any capital monies for the time being in the hands of the said trustees or trustee, such sum or sums of money as may be required for the payment of any gross sums charged on the said premises or any part thereof, or for any improvements which the said trustees or trustee shall consider to be of a permanent character:

Power to lease for twenty-one years.

PROVIDED ALWAYS, that, after the said intended marriage, and while the said freehold, copyhold, and leasehold hereditaments and premises, or any of them, shall remain unsold under the trust for sale hereinbefore contained, it shall be lawful for the said trustees or trustee from time to time, at the request in writing of the said [*husband*] and [*wife*] during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor at the discretion of the said trustees or trustee, to accept surrenders of any existing leases of the said lands and premises, or any part thereof, and to demise or lease the same, or so much or such parts thereof as for the time being shall remain unsold, or any part of the same, either from year to year, or for any term of years, to take effect in possession, or within six calendar months from the date of the lease, not exceeding twenty-one years from the time of letting, at the best yearly rent obtainable, without taking anything in the nature of a fine or premium (*r*), and with and subject to such covenants

(*r*) If desired, instead of prohibiting the taking of a fine or premium the following words may be here inserted:—

"having regard to any fine or premium which may be taken,

XXXIII. Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.

and conditions as the said trustees or trustee shall think proper, but so that there be contained in every such lease a condition of re-entry for non-payment of the rent thereby to be reserved, and so that the lessee execute a counterpart thereof, and thereby covenant for the payment of the rent: And also, with such consent or at such discretion as aforesaid, to demise or lease all or any mines, quarries, minerals, stones, gravel, clay, or other substances, whether the same shall have been previously opened or worked or not, in, under, or upon the said lands and premises, or any part thereof, which shall for the time being remain unsold, with or without the surface of the same lands, or any part thereof, and with or without any messuages, buildings, or lands convenient to be held therewith, for any term or terms not exceeding sixty years, to take effect in possession or within —— calendar months from the date of the lease, with such easements, rights, privileges, and powers for or with respect to sinking, searching for, winning, making merchantable, smelting, or otherwise converting or working for the purpose of any manufacture, carrying away of and disposing of any mines, minerals, or other substances, and erecting buildings, engines, and machinery, and executing engineering and other works, and with any other easements, rights, privileges, and powers for or incident to or connected with mining purposes in relation to the premises comprised in any lease granted under this present power; And to insert in any such lease powers of instroke and outstroke, and an average clause for enabling short workings in any one year to be made up in the following year or years without paying any royalty for the minerals or other substances gotten and raised, as shall be required to make up the deficiency, and a proviso for referring disputes to arbitration, and generally such powers, clauses, and provisions usual in mining leases as the said trustees or trustee shall think proper or expedient, but so that there be reserved in every such lease the best rent or rents, royalties, renders, and reservations, by the acre, ton, or otherwise, and either fixed in amount or variable according to

Power to grant mining leases.

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and so that any such fine or premium shall be paid to the said trustees or trustee, and be held and applied by them or him as if the same were monies arising from a sale of the premises comprised in the lease."

XXXIII. Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.

the average worked, or the quantity or value of the minerals or substances gotten and raised, or made merchantable and sold, or otherwise, as for the time being, and having regard to the circumstances of the case can be reasonably obtained without taking any fine or premium (*s*), and so that there be inserted in every lease granted under this present power a condition of re-entry for non-payment or non-delivery of the rent or rents, royalties, renders, and reservations thereby reserved, and so that the lessee or lessees execute a counterpart thereof, and thereby covenant for the payment or delivery of the rent or rents, royalties, renders, and reservations thereby reserved: And at such request, or at such discretion as aforesaid, to demise or lease any part of the said lands and premises to any person who shall improve, or covenant or agree to improve the same within —— years from the date of the lease, by erecting or building thereupon any new house or new erection, or by rebuilding, or repairing, or adding to any of the messuages, erections, and buildings whatsoever, which now are or which hereafter shall be upon the said lands or any part thereof, or who shall expend or covenant to expend any sum of money in the improvement or amelioration thereof respectively, which the said trustees or trustee shall think adequate, having regard to the interest to be demised or other circumstances, for any term of years not exceeding ninety-nine years, to take effect in possession or within six calendar months from the date of the lease, with or without an option to be exercised within an agreed number of years, not exceeding —— years, for the lessee or lessees to purchase the demised lands and premises or any part thereof, at a price to be fixed at the time of making the demise or lease and so that any such price shall be paid to the said trustees or trustee, and be held and applied by them or him as if the same were monies arising from the sale of the premises comprised in the lease, at such rent or

Power to grant building leases for ninety-nine years.

(*s*) If desired, instead of prohibiting the taking of a fine or premium, the following words may be here inserted :—

"having regard to any fine or premium which may be taken, and so that any such fine or premium shall be paid to the said trustees or trustee, and be held and applied by them or him as if the same were monies arising from a sale of the premises comprised in the lease."

upon such terms and conditions as shall be thought reasonable, and without taking anything in the nature of a fine or premium (*t*) for the making thereof beyond such covenants or agreements as aforesaid; but so that during the first three years of any such term it shall be lawful for the said trustees or trustee to reserve, in any lease granted under this present power, a peppercorn rent or other rent less than the full rent to be reserved during the remainder of the term, and so that the lessee execute a counterpart of the lease so to be made to him as aforesaid, and thereby covenant for payment of the rent, and be not thereby exempted from liability for committing waste farther than shall be necessary for making or effecting the buildings or improvements thereby covenanted and agreed to be made (*u*) [*power to appoint new trustees, ante*, p. 664]: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall not be responsible for the payment of any rents or in respect

Indemnity and reimbursement of trustees in respect of leaseholds.

(*t*) Or, if desired, the following words may be substituted for those in the text:—

"having regard to any fine or premium, &c." (*as in last note*).

(*u*) As to giving to lessees an option to purchase the reversion, see *ante*, p. 664, note (*c*). If preferred, the following clause may be substituted for the powers given in the text:—

"PROVIDED ALWAYS, that it shall be lawful for the said trustees or trustee, at such request, or at such discretion as aforesaid, to exercise, in respect to the said hereditaments and premises hereby granted, covenanted to be surrendered, and assigned respectively, all such powers of leasing and accepting surrenders of leases, and entering into, varying, and rescinding contracts with regard to leases, and powers incidental or ancillary thereto respectively, and generally all such other powers of every description which the said trustees or trustee shall deem it proper or expedient to exercise, as are by the Settled Land Act, 1882, and any amending Acts for the time being in force, conferred on tenants for life; And further (by way of extension or enlargement of the powers of the said Act, and so that such extended or enlarged powers shall be exercised in like manner and with the like effect as if they were powers conferred by the said Act) that it shall be lawful for the said trustees or trustee, &c." [*add any additional form which may be thought advisable: see post*, pp. 705 *et seq.*].

Power for trustees to exercise statutory powers of leasing, &c., conferred by the Settled Land Act, 1882.

XXXIII. Conveyance of Freeholds, Copyholds, and Leaseholds on Trust for Sale, with extensive Powers.

of the performance or observance of any covenants or conditions reserved by or contained in the said leases mentioned in the third schedule hereunder written, or any of them, or for or in respect of any damages, loss, costs, or expenses which may be caused or incurred by or by reason of the non-payment of any such rents, or the non-performance or non-observance of any of such covenants and conditions; AND that the said trustees or trustee may reimburse themselves or himself, or pay and discharge out of the trust estate all damages, losses, and expenses paid or incurred by them or him in respect of the said leasehold premises hereby assigned.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

THE THIRD SCHEDULE ABOVE REFERRED TO.

XXXIV. *SURRENDER by* HUSBAND *of* COPYHOLDS, *pursuant to a Covenant in his Marriage Settlement, to the use of the Trustees of the Settlement* (*x*).

Recital of conveyance on trust for sale, or settlement.

Manor of —— in the county of ——. WHEREAS, by an indenture dated the —— day of ——, 18—, and made between [*husband*], of, &c., of the first part, [*wife*], now the wife of the said [*husband*], but therein called and described as [*name*], of, &c., spinster, of the second part, and [*trustees*], of the third part (being a conveyance in trust for sale of the lands and hereditaments

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Surrenders, by whom prepared.

(*x*) The above Precedent is here inserted, both for purposes of reference, and also in case the settlor's solicitor should be called on to prepare such an instrument. This is, however, very seldom the case, as surrenders are generally prepared by the steward of the manor, and a custom that a steward shall prepare all surrenders and charge a reasonable fee therefor, is good: *R.* v. *Rigge*, 2 B. & Al. 550; *R.* v. *Bishopstoke*, 8 Dow. P. C. 608; and see *ante*, Vol. V., p. 341. These instruments follow the form prescribed by the usage of the particular manor, and accordingly vary somewhat in phraseology. If the conveyance and declaration of trusts are effected by separate deeds the words in leaded brackets will be omitted.

Stamp, 10*s*.

XXXIV. Surrender of Copyholds.

therein particularly described [*or* a settlement], made in consideration of the marriage then intended, and shortly afterwards solemnized between the said [*husband*] and [*wife*], his wife), it was witnessed that in consideration of the said then intended marriage the said [*husband*] thereby [granted unto the said [*trustees*] and their heirs all and singular the freehold messuages, lands, tenements and hereditaments therein particularly described, to hold the same unto the said [*trustees*], their heirs and assigns, upon the trusts and with and subject to the powers and provisions in the said indenture limited and declared concerning the same freehold premises; and by the same indenture it was also witnessed that the said [*husband*] thereby] covenanted with the said [*trustees*] that he would, after the solemnization of the said then intended marriage, duly surrender, according to the custom of the said manor, the copyhold or customary hereditaments therein and hereinafter described, with their appurtenances to the use of the said trustees, their heirs and assigns for ever, upon the trust and with and subject to the powers and provisions therein declared and contained concerning the same [*or* upon and for such trusts, intents and purposes as would as near as might be correspond to the uses and trusts thereby and therein limited, declared and contained concerning the said freehold hereditaments and premises thereby assured]: NOW BE IT REMEMBERED Surrender. that on the —— day of ——, 18—, the said [*husband*] came before [*steward*], of, &c., steward of the said manor, and in performance of the said covenant contained in the said indenture of settlement, did out of court surrender into the hands of the lord of the said manor by the rod, by the hands and acceptance of the said steward according to the custom of the said manor: ALL that copyhold [*describe parcels*], with the appurtenances to the same premises belonging or in anywise appertaining, to which hereditaments and premises the said [*husband*] was admitted at a court held for the said manor on the —— day of ——, 18—: TO THE USE of the said [*trustees*], their heirs and assigns for ever, according to the custom of the said manor, by the rents and services therefor due and of right accustomed, BUT UPON THE TRUSTS and with and subject to the powers and provisions, upon, with, and subject to which the same copyhold or customary hereditaments and premises were by the hereinbefore recited indenture covenanted to be surrendered.

IN WITNESS, &c.

XXXV. *SETTLEMENT on* MARRIAGE *of* FREEHOLDS *and* COPYHOLDS *belonging to the intended* HUSBAND; LIMITATION *of* RENTCHARGE *by way of* PIN-MONEY *to the intended* WIFE; *and subject thereto* LIMITATION *of* LANDS *to the use of the* HUSBAND *for* LIFE, *with remainder to the use that the* WIFE *may receive a* JOINTURE, *and subject thereto to* TRUSTEES *for* 500 *years to secure* PORTIONS *for* YOUNGER CHILDREN, *with remainder to the use of the first and other* SONS *of the Marriage successively in* TAIL MALE, *remainder to the* HUSBAND *in* FEE. TRUSTS *of* TERM *for securing* PORTIONS. POWERS *of* JOINTURING *and* CHARGING *portions*. TRUSTS *of* COPYHOLDS *to correspond with* USES *of* FREEHOLDS. SETTLEMENT *of* CHATTELS *as* HEIRLOOMS.

THIS INDENTURE (*y*), made the —— day of ——,
Parties. 18—, BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c.(*z*), of the third

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(*y*) Stamp 30*s*., viz. 10*s*. in respect of the freeholds, 10*s*. in respect of the copyholds, and 10*s*. in respect of the heirlooms. Neither land nor chattels are subject to *ad valorem* duty: see the schedule to the Stamp Act, 1870, tit. "SETTLEMENT," *ante*, p. 540; and see *Re Stuckley's Settlement*, L. R. 5 Ex. 85.

(*z*) It was formerly the practice in real property settlements to have several sets of trustees, viz., trustees for the general purposes of the settlement, to whom were given powers of sale, exchange, &c., and separate trustees of each term, limited by the settlement for the purpose of securing pin-money, jointure or portions, the object being to prevent the possibility of the several terms merging into each other, or into the estate in fee limited to the general trustees. Now, however, by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 4, there is no merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. It is not, therefore, absolutely necessary to appoint more than a single set of trustees for all purposes of the settlement. It is, however, more convenient that there should be two separate sets of trustees, as in the next Precedent, viz., the trustees of the portions term, and the general trustees of the settlement; the respective investments of trust funds will thus be kept distinct, and difficulties will be avoided which otherwise might arise from the same persons having charge of distinct and possibly conflicting interests. It is advisable to appoint not less than three general trustees of a settlement, as otherwise, by the death or retirement of one, the number is at

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

part: WITNESSETH (*a*) that, in pursuance of an agreement entered into upon the treaty for a marriage which is intended shortly to be solemnized between the said [*husband*] and [*wife*], and in consideration of such intended marriage, the said [*husband*] with the approbation of the said [*wife*], hereby grants, and as settlor conveys unto the said [*trustees*] and their heirs, ALL THAT mansion known as —— Hall, together with the outbuildings, gardens, pleasure-grounds, park, and demesne, and other lands usually occupied therewith, AND ALL and singular the manors or reputed manors, messuages and other buildings, farms, lands, and hereditaments, corporeal and incorporeal, described in the first schedule hereunder written, AND ALSO all other (if any) the freehold messuages, lands, tithe rentcharges and hereditaments of every description of the said [*husband*] situate in or arising out of the respective parishes of —— and —— in the county of ——, TO HOLD the premises hereinbefore expressed to be hereby granted unto the said [*trustees*] and their heirs, TO THE USE of the said [*husband*], his heirs and assigns, until the said intended marriage, and after the solemnization thereof TO THE USE that the said [*wife*] shall during the now intended coverture receive by way of pin-money the yearly sum of £——, to be charged upon and issuing out of the hereditaments and premises hereby granted, to commence from the day of the solemnization of the said intended marriage, and to be considered as accruing from day to day, but to be paid without any deduction (*c*) by equal quarterly payments, on the usual quarter days, the first payment to be made on such of the said days as shall happen

Testatum.

Grant of freehold parcels.

Habendum.

To trustees to use of husband till marriage.

Limitation of rentcharge by way of pin-money (*b*).

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once reduced below that required by the Settled Land Act, 1882, sects. 39 and 45, to receive notice of the intended exercise by a tenant for life of his powers, or to receive and give discharges for capital money arising under the Act.

(*a*) As to recitals in real settlements, see *ante*, p. 384.

(*b*) See as to limitations of rentcharges by way of pin-money, *ante*, pp. 384 *et seq.*

(*c*) The words "without any deduction" will not make the rentcharge payable free of income tax, and it would seem that the limitation of a rentcharge by a deed of settlement on marriage cannot be made clear of income tax, as this would apparently be a void contract within sect. 103 of the stat. 5 & 6 Vict. c. 35: see *Floyer* v. *Bankes*, 9 Jur. (N. S.) 684; *Att.-Gen.* v. *Shield*, 3 H. & N. 834. In the case of a will, a rentcharge may be expressly given clear of income tax: see *Festing* v. *Taylor*, 3 B. & S. 217; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 62; *Re Bannerman's Estate*, 21 Ch. D. 105; and possibly the same rule might be held to apply to voluntary settlements by deed.

XXXV. **Marriage Settlement of Husband's Freeholds, Copyholds, &c.**

next after the said intended marriage, but so that she shall not have power to anticipate such yearly sum or any part thereof; And subject thereto, TO THE USE of the said [*husband*] and his assigns during his life without impeachment of waste; With remainder TO THE USE that the said [*wife*] (if she shall survive the said [*husband*]) shall thenceforth during her life receive the yearly rentcharge of £—— for her jointure and in bar of dower and freebench, to be charged upon and issuing out of the said hereditaments and premises hereby granted, to commence from the day of the death of the said [*husband*], and to be considered as accruing from day to day, but to be paid without any deduction by equal half-yearly payments on the 25th day of March and the 29th day of September in every year, the first of such payments to be made on such of the said days as shall first happen after the death of the said [*husband*], and in proportion to the period which shall then have elapsed, if the said [*wife*] shall then be living, or if not a proportioned part to be paid at her death; And subject as aforesaid To THE USE of the said [*trustees*], their executors, administrators, and assigns (*d*), for the term of 500 years from the death of the said [*husband*] without impeachment of waste, Upon the trusts and with and subject to the powers and provisions hereinafter contained concerning the same; And subject as aforesaid, To THE USE of the first and other sons of the said [*husband*] by the said [*wife*] successively according to seniority, and the heirs male of their respective bodies; With remainder To THE USE of the said [*husband*], his heirs and assigns: AND IT IS HEREBY AGREED AND DECLARED that the said hereditaments and premises hereby granted are hereby limited to the use of the said [*trustees*], their executors, administrators, and assigns, for the said term of 500 years, UPON TRUST that, if there shall be any younger child or children of the said intended marriage (that is to say, any child or children other than an eldest or only son, or any other son or sons, who, before his or their respectively attaining the age of twenty-one years, shall become entitled either in possession or remainder, under or by virtue of these presents to the said hereditaments and premises for the first estate in tail male) who being a son or sons shall attain the

Remainder to use of husband for life.

Remainder to use that wife shall receive a jointure.

Remainder to use of trustees for 500 years.

Remainder to use of first and other sons of the marriage in tail male.

Remainder to use of husband in fee.

Trust of term of 500 years for raising portions.

(*d*) The words "executors and administrators" are not strictly necessary, and may be omitted if desired; they will take the term without being mentioned.

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

age of twenty-one years, or being a daughter or daughters shall attain that age or marry, then the said [*trustees*] and the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall after the death of the said [*husband*], or in his lifetime with his consent in writing, by mortgage of the premises comprised in the said term of 500 years, or any part thereof, for all or any part of the same term, or by or out of the rents and profits of the same premises, or any part thereof, or by sale of any timber or minerals, or by all or any of such means, or by any other reasonable means, raise for the portion or portions of such younger child or children as aforesaid such sum of money as is hereinafter mentioned, (that is to say) If there shall be but one such younger child the sum of £——; And if there shall be but two such younger children the sum of £——; And if there shall be three or more such younger children the sum of £——; the said sum of £——, £——, or £——, as the event may happen, to be vested in and paid to such child, or to all or such one or more exclusively of the other or others of the said younger children (*e*) at such age or time, or respective ages or times, (not previous as to a male to his attaining the age of twenty-one years, or as to a female to her attaining that age or marrying), if more than one, in such shares, and with such future, executory, or other trusts for the benefit of any such child or children (*f*), with such provisions for their or any of their maintenance, education, and advancement, upon such conditions, and generally in such manner as the said [*husband*] shall, by any deed or deeds, revocable or irrevocable, or by will or codicil appoint; And in default of such appointment, and so far as no such appointment shall extend, to be paid to or divided between or among the said younger child or children (*f*), if more than one, in equal shares, to be paid to him, her, or them respectively, being a male or males, on attaining twenty-one years, and being a female or females on attaining that age or marriage, if the same re-

(*e*) If desired, this provision may be extended to remoter issue, thus:—

"or the issue of any such child or children, such issue to be born and take vested interests within twenty-one years after the death of the said [*husband*]."

(*f*) "Or remoter issue."

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

spectively shall happen after the death of the said [*husband*], but if the same respectively shall happen during his life, then immediately after his death; PROVIDED ALWAYS, and it is hereby agreed and declared that, in default of appointment to the contrary, no child who (*a*) shall take any part of the said sum of £——, or £—— (as the case may be) under or by virtue of an appointment made under the power hereinbefore contained, shall be entitled to participate in the unappointed part of the same sum without bringing the part appointed to him or her (*b*) into hotchpot and accounting for the same accordingly: AND it is hereby further agreed and declared that the said trustees or trustee shall, after the death of the said [*husband*], by any such means as aforesaid, raise for the maintenance and education of the said younger child or children (*c*), such yearly sum or sums (not exceeding what the interest of the then expectant or presumptive portion or portions intended to be hereby provided for such child or children would amount to at the rate of 4 per cent. per annum) as the said [*husband*] shall by any deed or deeds, revocable or irrevocable, or by will or codicil appoint, and in default of appointment and so far as no such appointment shall extend as the said trustees or trustee shall think fit, and shall apply the yearly sum or sums so raised accordingly; AND it is hereby declared that the said trustees or trustee may either themselves or himself so pay and apply the same, or may pay the same to the guardian or guardians of such child (*c*) for the purposes aforesaid, without seeing to the application thereof; AND upon further trust that it shall be lawful for the said trustees or trustee, at any time or times after the death of the said [*husband*], or in his lifetime with his consent in writing, to raise by the means aforesaid, or any of them, for the advancement of any such younger child or children (*c*), any sum or sums of money not exceeding in the whole for any such child or children (*c*) one moiety of his, her, or their then expectant or presumptive portion or portions, whether under any appointment or in default of appointment; and which sum or sums shall be considered as part of the portion or portions provided for such younger child or children (*c*), and shall pay and apply the same for his, her, or their preferment and advancement, or benefit [including, &c., *see ante*, p. 547],

Hotchpot clause.

Trusts for maintenance.

Trust for advancement of younger children.

(*a*) "Or whose issue."
(*b*) "Or to his or her issue."
(*c*) "Or remoter issue."

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

in such manner as the said [*husband*] shall direct, and in default of and subject to such direction, as the said trustees or trustee shall in their or his discretion think fit: PROVIDED ALWAYS, that it shall be lawful for the said [*husband*] by deed to require the said trustees or trustee at any time or times, to raise, by the ways and means aforesaid, the whole or any part or parts of the portion or portions to which, by appointment or otherwise, any child or children (*d*) of the intended marriage shall for the time being be entitled for a vested interest or vested interests, and to pay such portion or portions, or the part or parts thereof required to be raised as aforesaid, to the child or children (*d*) entitled thereto, or to any person or persons claiming through or in right of him, her, or them; and that the said trustees or trustee shall in all respects comply with every such request, and every such deed shall, if there shall be two or more younger children (*d*) of the intended marriage, and if it shall in other respects be necessary, operate as an execution of the power of appointment between or among such children (*d*) hereinbefore contained; PROVIDED ALSO, that in case of the said [*husband*] so as aforesaid requiring the whole or any part or parts of any portion or portions to be raised, it shall be lawful for the said trustees or trustee, instead of actually raising the same, to assign or demise the premises, or any part or parts thereof, to the person or persons to whom the same shall be directed to be paid, or as he, she, or they shall direct, by way of mortgage for securing the sum or sums required to be raised, with interest for the same at such rate as shall be in such assignment or demise mentioned; PROVIDED ALWAYS, that, if it shall be desired, during the lifetime of the said [*husband*], to raise any sum of money under the trusts hereinbefore declared of the term by mortgage of all or any part of the premises comprised in the same term, then and in every such case it shall be lawful for the said trustees or trustee by deed to appoint the premises which shall be so mortgaged under the trusts of the said term, for the term of 99 years, to commence from the execution of the deed by which this present power shall be exercised, if the said [*husband*] shall so long live, without impeachment of waste, and the said [*husband*] shall, as between himself and the persons entitled in remainder (but without prejudice to the rights of the mortgagee or mortgagees) be bound to keep

Power for the husband to require portions to be raised in his lifetime.

Power for trustees to create specific securities.

Power for trustees to limit a term to take effect in the life of the husband to secure portions raised in his lifetime.

(*d*) "Or remoter issue."

XXXV. **Marriage Settlement of Husband's Freeholds, Copyholds, &c.**

down the interest accruing during his life upon any money so raised in his lifetime: PROVIDED ALWAYS, that, subject to the trusts hereinbefore declared, and to the right of the said trustees or trustee by the ways and means aforesaid, to raise and reimburse themselves or himself all costs and expenses incurred in relation to the trusts aforesaid, the rents and profits of the premises comprised in the term of 500 years, or so much of the same rents and profits as shall from time to time remain after answering the trusts aforesaid, shall be received by the person or persons for the time being entitled to the same premises in reversion expectant upon the same term (*e*): PROVIDED ALWAYS, AND IT IS HEREBY AGREED AND DECLARED, that it shall be lawful for the said [*husband*] if he shall marry again subsequently to the said now intended marriage (*g*) by deed revocable or irrevocable, or by will or codicil, to appoint to any and every woman whom he may so subsequently marry (and that either before or after any and every such marriage), for her life, or for any less period by way of jointure, any yearly rentcharge or yearly rent-charges, not exceeding in the whole by the year the sum of £——, free from all deductions, to be charged upon all or any of the said hereditaments and premises hereby granted and to be paid at such times and in such manner as he shall direct; and this power of jointuring may be exercised as often as the said [*husband*] shall marry: PROVIDED ALSO, AND IT IS HEREBY FURTHER AGREED AND DECLARED, that it shall be lawful for the said [*husband*] if he shall marry again subsequently to the said now intended marriage at any time or times by deed revocable or irrevocable, or by will or codicil,

Surplus rents to be taken by reversioner.

Power to husband to jointure any future wife (*f*).

Power to charge estates with portions for children of a subsequent marriage (*h*).

(*e*) The trusts of the term to secure portions were formerly, according to the usual practice, followed by provisions declaring trusts as to the receipt and application by the trustees of the rents and profits of the estate during the minorities of persons beneficially entitled, with powers to fell timber and work mines, and for the general management of the estate. The necessity for such provisions seems, however, to be generally superseded by statutory powers given by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sect. 42.

(*f*) There is now no necessity to give expressly to the donee of a power to create a rentcharge any authority to confer powers of distress on entry, or to limit a term for securing the rentcharge: see sect. 44 of the Conveyancing and Law of Property Act, 1881; see also, *ante*, p. 386.

(*g*) It is better not to say "if he shall survive the said [*wife*] and marry again," as if these words are used the power would not be exerciseable on a re-marriage after a divorce.

(*h*) If desired this power may be extended so as to include remoter issue, *ut ante*, pp. 691 to 693, *mutatis mutandis*.

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

to charge all or any of the said hereditaments and premises hereby settled with the payment of such sum or sums of money as he shall think fit, not exceeding in the whole in the several events hereinafter specified the several sums hereinafter mentioned, as and for the portion or portions of every or any of his younger child or children by any such after-taken wife (that is to say, &c., *ut ante*, p. 690) who being a son or sons shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry, that is to say, if there shall be only one such child the sum of £——, and if there shall be only two such children the sum of £——, and if there shall be three or more such children the sum of £——, such portion or portions to be an interest or interests vested in and to be paid to or divided between or among such child or children or any one or more of them, at such age or time, or respective ages or times, (not previous as to a son to his attaining the age of twenty-one years, or as to a daughter to her attaining that age or marrying), and with such provisions for maintenance and advancement in the meantime, and, if more than one in such shares and proportions and with such annual sum or sums of money, conditions, restrictions, and limitations over (such annual sum or sums of money and limitations over being for the benefit of one or more such child or children respectively) as the said [*husband*] shall in manner aforesaid direct: And by the same or any other deed, or by will or codicil, to charge the hereditaments charged with such portion or portions respectively with the payment of such yearly sum or sums of money as he shall think fit, for or towards the maintenance and education of the child or children presumptively entitled to any portion or portions under the power of charging the same hereinbefore contained, until her, his or their portion or respective portions shall become vested and payable, so as the same do not exceed the interest of such his, her, or their portion or respective portions or presumptive or expectant portion or respective portions after the rate of 4 per centum per annum; And also by the same or any other deed, or by will, or codicil, to charge all or any of the hereditaments and premises hereby settled with any sum or sums of money, not exceeding in the whole for any such younger child or children by any such after-taken wife as aforesaid one moiety of his, her, or their the expectant or presumptive portion or portions, and which sum or sums shall be considered as part of the portion or portions provided for such

Power to charge yearly sums for maintenance, &c., of such children;

to charge gross sums for advancement of such children;

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

child or children, to be raised for the advancement [including, &c., *see ante*, p. 547] or benefit of such child or children and to be applied for that purpose in such manner as the said [*husband*] shall direct, and in default of such direction, as the said trustees or trustee shall in their or his discretion think fit; And by the same or any other deed, or by will or codicil, to appoint for any term or terms of years, to any person or persons with or without impeachment of waste, the said hereditaments so to be charged as aforesaid upon the usual trusts, for securing, raising, and paying such portion or respective portions, and the costs of and incident to raising the same and the execution of the trusts thereof: PROVIDED ALWAYS, and it is hereby agreed and declared, that if any person who would, if of full age, be entitled to the possession or receipt of the rents and profits of the said hereditaments and premises hereby granted shall die under the age of twenty-one years, then the said trustees or trustee shall stand possessed of the rents and profits of the same hereditaments received by them during the minority of the person so dying, and all accumulations and investments thereof, or so much thereof as shall not have been applied under any statutory power, and invest and apply the same as if the same were capital monies arising under the Settled Land Act, 1882, from the same premises, but (*h*) liable ultimately to be laid out in the purchase of real estate to be assured and settled to the uses, upon the trusts, and with and subject to the powers and provisions hereinbefore limited and declared concerning the said hereditaments and premises hereby granted, but not so as to increase or multiply charges or powers of charging: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, the said [*husband*] hereby covenants with the said [*trustees*] that, in case the marriage shall be solemnized, he will forthwith, at his own cost, surrender into the hands of the lord of the manor of ——, in the county of ——, All those copyhold messuages and other buildings, farms, lands, and hereditaments described in the second schedule hereunder written, and all other if any the copyhold hereditaments of every description of the said [*husband*] situate

to limit terms for securing portions.

Proviso as to destination of accumulations of rents and profits.

Second *testatum*.

Covenant to surrender copyholds;

(*h*) These words are inserted to obviate any doubt as to whether a mere direction that the monies shall be held and applied as capital money arising under the Act would operate as an effectual conversion into land, so as to prevent the monies from vesting absolutely in the first tenant in tail who attains twenty-one years: see Wolst. & Turn. Conv. and S. L. Acts, 251.

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

in the respective parishes of —— and —— aforesaid, And he hereby as settlor conveys all such copyhold hereditaments and premises, TO THE USE of the said [*trustees*], and their heirs, according to the custom of the Manor of ——, at and under the customary fines, rents, suits, and services, UPON SUCH TRUSTS, and with, under, and subject to such powers, provisions and declarations, as shall as nearly correspond with the uses, trusts, powers and provisions hereinbefore limited, concerning the said hereditaments and premises hereby granted, as the different qualities of the estates, and the rules of equity will permit, but not so as to increase or multiply charges or powers of charging; AND the said [*husband*] hereby declares, that until the same premises shall be surrendered in pursuance of this covenant, he the said [*husband*] will stand seised of the same premises in trust for the said [*trustees*] and their heirs, UPON SUCH TRUSTS and with and subject to such powers and provisions as the same would be subject to if the same had been so surrendered as aforesaid: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, the said [*husband*] hereby assigns and as settlor conveys unto the said [*trustees*], ALL and singular the jewels, plate, furniture, pictures, statues, and other works of art, books, and other articles of domestic use and ornament now in or about —— Hall, aforesaid, To HOLD the same unto the said [*trustees*] their executors, administrators, and assigns UPON TRUST to permit the same to be held and enjoyed as heirlooms (*i*) by the person or persons for the time being entitled to the hereditaments hereby settled under the uses and limitations hereinbefore declared as nearly as the rules of law and equity will permit, but not so as to increase or multiply charges or powers of charging and so that the said heirlooms shall not vest absolutely in any person hereby made tenant in tail by purchase of the hereditaments hereby settled, unless he or she shall attain the age of twenty-one years, [and shall as such tenant in tail become seised or entitled in actual possession of or to the same hereditaments or the receipt of the rents and profits thereof, or unless he or she shall become seised of or entitled to the same

on trusts to correspond with uses of freeholds.

Declaration of trusts of copyholds till surrender.

Third *testatum.*

Assignment of jewels, plate, &c.

Habendum.

To trustees upon trust as heirlooms.

(*i*) As to the power of a tenant for life to sell heirlooms, see Settled Land Act, 1882, sect. 37, *ante*, p. 479; and see the observations as to settling personal estate to go with realty, *ante*, pp. 511 *et seq.*

It is obvious that, if the words in brackets are inserted, an important extension of the limitations is effected.

XXXV. Marriage Settlement of Husband's Freeholds, Copyholds, &c.

in possession or remainder in fee simple by virtue of a disentailing assurance or otherwise], but on the death of such tenant in tail under that age, [without having been so seised or entitled as aforesaid], shall go to the person or persons who shall thereupon become entitled to the same hereditaments, under the uses and limitations hereinbefore declared [but if he or she shall be a tenant in tail by purchase thereof, then subject to the conditions hereinafter mentioned]: PROVIDED ALWAYS, that as soon as conveniently may be, after the execution of these presents, an inventory shall be taken of the jewels, plate, and other articles hereinbefore assigned as heirlooms, and such inventory (to be revised as occasion shall require) shall be signed by the person for the time being entitled to the use of the heirlooms and also by the said trustees or trustee: PROVIDED ALSO, that the said heirlooms shall at all times be kept in good preservation, and adequately insured against loss or damage by fire by the person for the time being entitled to the enjoyment thereof, but it is hereby expressly agreed and declared that the said trustees or trustee shall not be bound to see to the preservation or insurance of the said heirlooms, or be responsible for any loss or injury which may happen thereto, but the said trustees or trustee shall not be precluded from interfering for the protection thereof when and if he or they shall think fit: PROVIDED ALWAYS, and it is hereby agreed and declared that the said trustees or trustee shall be the trustees or trustee of the settlement hereby created for all the purposes of the Settled Land Acts, 1882 to 1889, and of any other Act or Acts for the time being relating to settled lands, and also for the purposes of section 42 of the Conveyancing and Law of Property Act, 1881; PROVIDED ALWAYS that the statutory power of appointing a new trustee or new trustees of these presents when and so often as a vacancy shall occur shall be vested in the said [*husband*] during his life, and after his death in the person, if of full age, and otherwise competent, for the time being seised of or entitled in possession to the said hereditaments or the receipt of the rents and profits thereof, and if there shall be no such person, then by the person or persons in whom such power is vested by statute [*trustee clauses, ante*, p. 552].

An inventory to be taken.

Appointment of trustees for purposes of Settled Land Acts, and of Conveyancing, &c., Act, 1881, s. 42.

Power to appoint new trustees.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

XXXVI. *SETTLEMENT on* MARRIAGE *of* FREEHOLDS *and of a* LEASEHOLD HOUSE *in Town belonging to the intended* WIFE. LIMITATION *of Lands to* TRUSTEES *for a* TERM *of* 99 *years during the intended Husband's Life to secure a* RENTCHARGE *to the* WIFE, *and subject thereto to the* HUSBAND *for* LIFE, *with remainder to the use of the* WIFE *for* LIFE, *with remainder to* TRUSTEES *to secure* PORTIONS, *with remainder to the use of the first and other* SONS *in* TAIL MALE *and in* TAIL, *with remainder to the use of the* DAUGHTERS *as* TENANTS IN COMMON *in* TAIL *with* CROSS REMAINDERS, *remainder to the* WIFE *in* FEE. TRUSTS *of* TERMS *for securing Rentcharge and Portions.* PROVISIONS *extending the* POWERS *and* PROVISIONS *of the* SETTLED LAND ACTS. TRUSTS *of* LEASEHOLDS *to correspond with* USES *of* FREEHOLDS.

THIS INDENTURE (*i*), made the —— day of ——, 18—, BETWEEN [*intended wife*], of, &c., of the first part; [*intended husband*], of, &c., of the second part; [*general trustee*], of, &c., [*general trustee*], of, &c., and [*general trustee*], of, &c., of the third part; And [*trustee of terms*], and [*trustee of terms*], of, &c., of the fourth part. WHEREAS a marriage is intended shortly to be solemnized between the said [*husband*] and [*wife*]; AND WHEREAS the said [*wife*] is seised of, or entitled to the several messuages, lands, and hereditaments particularly described in the schedule hereunder written for an estate of inheritance in fee simple in possession free from incumbrances; AND WHEREAS by an indenture of lease dated, &c., and made between [*parties*], all that messuage or dwelling-house, &c., [*describe parcels from lease*], were demised to the said [*original lessee*], his executors, administrators, and assigns, from the —— day of ——, 18—, for the term of —— years, at a yearly rent of £——, and subject to the lessee's covenants and conditions contained in the same indenture of lease; AND WHEREAS by divers mesne assignments and acts in the law and ultimately by an indenture dated, &c., and made between [*parties*], all the premises comprised in the hereinbefore recited indenture of lease have become and are now vested in the said [*wife*] for the residue of the said term

Parties (*j*).

Recitals (*k*): of intended marriage; of wife's seisin of freeholds;

of lease of town-house;

of mesne assignments, and wife's title to leasehold house;

(*i*) Stamp, 20*s*.

(*j*) As to the advisability of having several sets of trustees of a real settlement, see *ante*, p. 383.

(*k*) As to the insertion of recitals in real settlements, see *ante*, p. 384.

XXXVI. Marriage Settlement of Wife's Freeholds, Leaseholds, &c.

of —— years; AND WHEREAS upon the treaty for the said intended marriage that the said freehold and leasehold hereditaments and premises respectively should be assured and settled in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the said intended marriage, the said [*wife*], with the approbation of the said [*husband*] hereby grants, and as settlor conveys unto the said [*general trustees*] and their heirs, all those, &c., [*freehold parcels by reference to schedule, ut ante*, p. 689, *mutatis mutandis*] TO HOLD the premises hereinbefore expressed to be hereby granted unto the said [*general trustees*] and their heirs, TO THE USE of the said [*wife*], her heirs and assigns, until the said intended marriage; And after the solemnization thereof, TO THE USE of the said [*trustees of terms*] for the term of 99 years thereafter without impeachment of waste, upon the trusts and with and subject to the powers and declarations hereinafter contained concerning the same; And from and after the expiration or determination of the said term of 99 years, and in the meantime subject thereto and to the trusts thereof, TO THE USE of the said [*general trustees*], their heirs and assigns, during the life of the said [*husband*], without impeachment of waste, UPON TRUST that the said [*general trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee, for the time being, for the general purposes of these presents (hereinafter called "the said trustees or trustee of this settlement") shall allow the said [*husband*] to enter into and retain possession, and receive the rents and profits of the same hereditaments, [without impeachment of waste,] during his life, or until he shall become a bankrupt, or do, execute, suffer, or concur in some act, deed, matter, or thing (other than some act, deed, matter, or thing in exercise of any power hereby conferred on him for or incident to the raising of money for any purpose authorised by, or by virtue of these presents) whereby, or by reason whereof his said life interest would, if absolutely given to him, vest in, belong to,

of agreement for settlement.

First *testatum*.

Habendum.

To use of wife till marriage, and thereafter, to trustees of terms for 99 years to secure rent-charge (*l*);

Subject thereto to general trustees during husband's life upon trust for him till bankruptcy, &c.

(*l*) Where the arrangements as to mode of settlement are as in this Precedent, it may be thought well to limit a term to the trustees *ab initio* to secure the rent-charge. But having regard to sect. 44 of the Conveyancing and Law of Property Act, 1881, all that is necessary is to limit the lands to the use that the wife shall receive a jointure as at p. 690. If the latter course is adopted, the trusts of the jointure term (*post*, p. 702) will of course be omitted.

or be charged in favour of some other person or persons: AND in the event of the failure or determination during the life of the said [*husband*] of the trust hereinbefore declared in his favour, the said trustees or trustee of this settlement shall immediately upon, and from and after such failure or determination, enter into, and during the remainder of the life of the said [*husband*], retain possession of the said hereditaments, manage the same as they or he shall think proper, in like manner as if they or he were the absolute owners thereof [*or* in like manner as if they or he were the trustees or trustee appointed to manage and superintend the management of land to the possession of which an infant is beneficially entitled under section 42 of the Conveyancing and Law of Property Act, 1881]: AND IT IS HEREBY AGREED AND DECLARED, that [it shall be lawful for the said trustees or trustee of this settlement, in their or his absolute discretion, to pay or apply the rents and profits of the said hereditaments, or any part thereof, during the remainder of the life of the said [*husband*], or for any shorter period or periods, continuous or discontinuous, to or for the personal support and maintenance of the said [*husband*] or his wife or children or remoter issue (if any) for the time being, or the person or persons to become entitled presumptively, contingently, or in expectancy under any of the limitations hereinafter contained, or such one or more, exclusively of the others or other of such persons, and in such manner as the said trustees or trustee shall think fit; AND that, subject to such discretionary power,] the said trustees or trustee of this settlement shall, during the remainder of the life of the said [*husband*], pay or apply the rents and profits of the said hereditaments to or for the benefit of the persons or person who under the limitations hereinafter contained would be, for the time being, next entitled in remainder to the same rents and profits if the said [*husband*] were then actually dead; or may allow such person or persons to enter into and retain possession of, occupy, manage, and enjoy the said hereditaments, and receive the rents and profits thereof during the remainder of the life of the said [*husband*]; AND from and after the death of the said [*husband*] TO THE USE of the said [*wife*] during her life, but so that she shall not during the now intended coverture have power to alien, charge, or dispose of such reversionary life estate by way of anticipation; And from and after the death of the survivor of them the said

discretionary power to apply rents for benefit of bankrupt, &c.;

destination of income during remainder of life of bankrupt tenant for life;

remainder to wife for life;

remainder

XXXVI. **Marriage Settlement of Wife's Freeholds, Leaseholds, &c.**

[*husband*] and [*wife*], To THE USE of the said [*trustees of terms*], their executors, administrators, and assigns, for the term of 500 years, upon the trusts hereinafter declared concerning the same; And from and after the expiration or determination of the same term, and in the meantime subject thereto and to the trusts thereof, To THE USE of the first and other sons of the said [*wife*] by the said [*husband*] successively according to seniority, and the heirs male of their respective bodies; And in default of such issue, To THE USE of the same first and other sons successively according to seniority, and the heirs of their respective bodies; And in default of such issue, To THE USE of all the daughters of the said [*wife*] by the said [*husband*] in equal shares, and the heirs of their respective bodies as tenants in common in equal shares (*m*); And if, and so often as there should be a failure of issue of any such daughter, then as to both her original share, and also such other share or shares in the said hereditaments as by virtue of this present clause shall have accrued to her or her issue, To THE USE of the others of such daughters, if more than one, and the heirs of their respective bodies, in equal shares, as tenants in common; and if there should be a failure of issue of all such daughters but one, or if there should be only one such daughter, then, as to the entirety of the said hereditaments, To THE USE of such one or only daughter and the heirs of her body; And in default of such issue, To THE USE of the said wife, her heirs and assigns: AND IT IS HEREBY DECLARED, that the premises are hereby limited to the use of the said [*trustees of terms*] for the said term of 99 years upon trust that the said [*trustees of terms*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the same term, shall during the joint lives of the said [*husband*] and [*wife*], out of the rents and profits of the premises, raise the clear yearly sum of £——, and pay the same to the said [*wife*] for her separate use, without power of anticipation, such yearly sum to be considered as commencing from the solemnization of the intended marriage, and accruing from day to day, but payable quarterly by equal payments, the first

to trustees of terms for 500 years to secure portions;

subject thereto to sons successively in tail male, and in tail;

remainder to daughters in tail, as tenants in common, with cross remainders in tail.

with cross remainders in tail;

ultimate remainder to wife in fee.

Trusts of jointure term.

(*m*) Limitations, in remainder to estates tail, given to the sons of the settlor's sons successively, giving estates tail to the son's daughters concurrently instead of successively, are not uncommon in marriage settlements.

of such payments to be made at the end of three calendar months after the solemnization of the marriage, if the said [*wife*] shall then be living, and also shall raise and pay all such monies as shall be required to defray the costs and expenses incurred in performing any of the trusts of the said term of 99 years, or otherwise in relation thereto, and shall permit the said [*husband*] to receive the residue of the rent and profits of the premises for his own use for the period and in manner aforesaid; AND IT IS HEREBY DECLARED, that the premises are hereby limited to the use of the said [*trustees of terms*], their executors, administrators, and assigns, for the said term of 500 years, Upon trust that if there shall be any younger child or children of the said intended marriage (that is to say, any child or children other than an eldest or only son, or other son or sons who, before his or their respectively attaining the age of twenty-one years shall become entitled either in possession or in remainder under or by virtue of these presents to the said hereditaments and premises for the first estate in tail male), who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, then the said trustees of terms or the survivor of them or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the said term of 500 years shall after the death of the survivor of them the said [*husband*] and [*wife*], or during their joint lives or the life of such survivor with the consent in writing of the said [*husband*] and [*wife*] or of the survivor of them by mortgage of the premises comprised in the said term of 500 years, or any part thereof, or by or out of the rents and profits thereof or any part thereof, or by sale of any timber or minerals or by all or any of such means or by any other reasonable means raise for the portion or portions of such younger child or children the sum of £——; such sum to be vested in and paid to such child or to all or such one or more exclusively of the others or other of the said younger children, at such age or time or respective ages or times (not previous as to a son to his attaining twenty-one years, or as to a daughter to her attaining that age or marrying) if more than one, in such shares, and with such future executory or

Trusts of portions term (*n*).

(*n*) As to extending portions to remoter issue, see *ante*, p. 691. In the present case, a fixed sum is provided for portions irrespective of the number of younger children.

XXXVI. **Marriage Settlement of Wife's Freeholds, Leaseholds, &c.**

other trusts for the benefit of any such child or children, with such provisions for their or any of their maintenance, education, and advancement, upon such conditions and generally in such manner as the said [*husband*] and [*wife*] shall jointly by any deed or deeds, revocable or irrevocable, or as the survivor of them shall in like manner, or by will or codicil appoint; And in default of such appointment, and so far as no such appointment shall extend, to be paid to or divided between or among the said younger child or children, if more than one in equal shares to be paid to him, her, or them respectively, being a son or sons on attaining twenty-one years, or being a daughter or daughters on attaining that age or marriage, if the same respectively shall happen after the death of the survivor of them the said [*husband*] and [*wife*], but if the same respectively shall happen during their, his, or her lives or life then immediately after the death of such survivor; [*Hotchpot clause, ante*, p. 692] AND IT IS HEREBY FURTHER AGREED and declared that the said trustees or trustee of this settlement shall after the death of the survivor of them the said [*husband*] and [*wife*] raise, &c., [*continue trust to raise for maintenance such yearly sums* "as the said [*husband*] and [*wife*] shall jointly by any deed or deeds revocable or irrevocable, or as the survivor of them shall in like manner or by will or codicil appoint," &c., *ut ante*, p. 692, *mutatis mutandis*];

Maintenance.

Advancement.

AND upon further trust that the said trustees or trustee of this settlement shall after the death of the survivor of them the said [*husband*] and [*wife*] or in the lifetime of them or of the survivor of them, with their, his, or her consent in writing, raise &c., [*continue trust for advancement*, "in such manner as the said [*husband*] and [*wife*] or the survivor of them shall direct," &c., *ut ante*, p. 692; *and add power for* "the said [*husband*] and [*wife*] jointly during their joint lives and for the survivor of them by deed" *to require portions to be raised in their, his, or her lifetime;* power for trustees to create specific securities; power for trustees to limit a term to take effect in the lifetime of the husband and wife or *the survivor, substituting throughout the words* "the said [*husband*] and [*wife*] or the survivor of them," *for the words* "the said [*husband*];" *and proviso that surplus rents are to be taken by the reversioner, ut ante*, pp. 693 *et seq.*]: PROVIDED ALWAYS, and it is hereby agreed and declared, that if the trust hereinbefore contained in favour of the said [*husband*] shall determine in his lifetime, then all the powers hereinbefore given to him jointly with the said [*wife*], or to him alone, if he shall survive her, of making

Proviso that husband's powers of appointment, &c., shall cease to be exercisable

or giving appointments, consents, or directions in favour of or in relation to any issue of the said intended marriage shall from and after such determination cease to be exercisable by him, but all such powers shall thenceforth be exercisable by the said wife alone if living as if the said [*husband*] had died at the time of such determination: PROVIDED ALWAYS, and it is hereby agreed and declared that it shall be lawful for the said [*wife*] if she shall marry again subsequently to the now intended marriage [or, if she shall survive the said [*husband*] and marry again] but subject and without prejudice to any of the uses, trusts, limitations, and powers herein contained, and for the time being subsisting or capable of taking effect, preceding or overriding the life estate hereinbefore limited to the said [*wife*] by deed, will, or codicil, to appoint to any and every man whom she may so subsequently marry (and that either before or after any and every such marriage), for his life, or for any less period, any yearly rentcharge or yearly rentcharges not exceeding £—— in the whole by the year, free from all deductions, to commence from her death to be charged upon and issuing out of all or any of the hereditaments and premises hereby settled, and to be paid at such times and in such manner as she shall direct; PROVIDED ALSO, and it is hereby further declared that it shall be lawful for the said wife if she shall marry again subsequently to the said intended marriage [*or*, if she shall survive the said [*husband*] and marry again] but subject &c., [*ut supra*] by deed &c., [*continue power for wife to charge estates with portions for her children by an after-taken husband, ut ante*, p. 694, *mutatis mutandis; Proviso as to destination of accumulations of rents and profits, ut ante*, p. 696]; PROVIDED ALWAYS, AND IT IS HEREBY AGREED AND DECLARED, that, notwithstanding anything contained in the Settled Land Acts, 1882 and 1889, or in any Act or Acts for the time being in force relating to settled lands respectively, the following powers in addition to, or

after bankruptcy (*n*).

Power for wife to appoint a rentcharge to an after-taken husband (*o*).

Power for wife to charge portions for children of a subsequent marriage.

Extension of powers under the Settled Land Acts.

Introductory clause (*p*).

(*n*) The exercise of these powers by the husband after bankruptcy should be expressly either negatived or affirmed: see *ante*, p. 576, note (*h*).

(*o*) See as to this *ante*, p. 694, note (*f*). If the power is given generally, it is to be borne in mind that in case of a divorce owing to the original husband's misconduct, the Court has power to modify the settlement by depriving him of the determinable life interest given by the settlement: see *ante*, p. 316.

(*p*) Where it is desired to confer on tenants for life and trustees a series of powers in addition to or extension of the statutory powers it may be convenient to group them together, preceded by

XXXVI. Marriage Settlement of Wife's Freeholds, Leaseholds, &c.

extension of the powers conferred by such Acts shall (so far as not forbidden by any Act or Acts for the time being in force) be hereby conferred on, and vested in, and exerciseable by every tenant for life in possession, or person having under those Acts the powers of a tenant for life, of or over the hereditaments hereinbefore devised and hereby settled, and on, in, and by the trustees or trustee of this settlement, [but during the life of the said [*wife*] not without her consent in writing] that is to say: FIRST, any tenant for life of, or person having the powers of a tenant for life over the hereditaments hereby settled (*r*), may make a [sale, exchange, partition,] lease, [mortgage, or charge], in exercise of any of the powers conferred on him by any of the Acts aforesaid, [*or*, by the Settled Land Act, 1882, or which may be conferred on him by any Act for the time being in force, relating to settled lands], without previous notice of his intention to exercise any such power to any trustee, or to the solicitor of any trustee, and without the leave of the Court; SECONDLY, under a mining lease of any mines or minerals hereby settled made in exercise of the power in this behalf in the Settled Land Act, 1882, whether the mines or minerals leased are already opened and in work or not, no part of the rent shall at any time be set aside as capital money arising under the last-mentioned Act, but the whole of such rent shall go as rents and profits; THIRDLY, any lease of the land hereby settled or any part thereof or of any easement,

Notices to trustees of settlement, &c., dispensed with (*q*).

Mining rents not to be capitalised (*s*)

Power to make long

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an introductory clause, and consecutively numbered. In a long and complicated will they would thus at once catch the eye and at once inform the parties concerned as to matters connected with dealings with the settled property. If the modifications of the statutory powers and provisions are not numerous they may be inserted in the usual manner by separate clauses, each introduced by the words "PROVIDED ALWAYS," &c.

Some other clauses as to powers of granting mining leases will be found *post*, at p. 745.

As to building leases, &c., giving to the lessees the option to purchase the reversion, see the Settled Land Act, 1889 (52 & 53 Vict. c. 36), sect. 2.

(*q*) See as to notice of intention to exercise the statutory powers sect. 45 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and sect. 5 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18), *ante*, pp. 481, 482.

(*r*) For an enumeration of limited owners having the powers of a tenant for life, see sect. 58 of the Act of 1882, set out *ante*, p. 491.

(*s*) See as to the capitalisation of mining rents, sect. 11 of the Act of 1882, *ante*, p. 452. The statutory restriction in this respect is often found to be inconvenient.

right, or privilege of any kind over or in relation to the same may be made for any purpose whatever, whether involving waste or not, for any term not exceeding, in case of a building lease [999] years, in case of a mining lease [100] years, and in case of any other lease [42] years; And grants may be made of the said lands or any part thereof in consideration of rents in perpetuity, either by way of rentcharge, or secured by a condition of re-entry on non-payment thereof or otherwise as the person or persons for the time being exercising the powers of making leases and grants lastly hereinbefore contained shall think proper or expedient; FOURTHLY, the principal mansion-house on the land hereby settled and the demesnes thereof, and other lands usually occupied therewith may be sold or leased by any tenant for life, or person having the powers of a tenant for life, under the trusts and provisions herein contained without the consent of the trustees of the settlement hereby created or an order of the Court; FIFTHLY, any part or parts of the lands and hereditaments hereby settled, situate in England or Wales, may be given in exchange for land in Scotland or Ireland; And capital money arising under the Settled Land Act, 1882, from the premises hereby settled may be applied in the purchase of lands and hereditaments in such last-mentioned countries, or either of them; SIXTHLY, capital money arising under the Settled Land Act, 1882, or by virtue of the exercise of any power herein contained, or other capital money for the time being requiring or capable of being invested, subject to the payment of claims properly payable thereout and to the application thereof for any special object for which the same shall have been raised, may as and when received be, with the consent in writing of the tenant for life for the time being if of full age and competent to act, but otherwise at the discretion of the said trustees or trustee of this settlement, invested, or otherwise applied in any of the following modes, namely: In the purchase, &c. (*x*): SEVENTHLY, any tenant for life or

leases, and fee farm grants (*t*).

Power for tenants for life to sell or lease principal mansion-house, park, &c. (*u*).

Extension of powers to exchange and purchase lands (*w*).

Extension of powers of investment and application of capital monies.

Power to

(*t*) As to the terms for which leases may be granted under the statutory powers, see sect. 6 of the Act of 1882, *ante*, p. 450. As to giving a lessee an option to purchase the reversion, see the Settled Land Act, 1889 (52 & 53 Vict. c. 36), sect. 2.

(*u*) As to the restrictions with regard to sales and leases of the principal mansion-house, &c., see sect. 15 of the Act of 1882, *ante*, p. 455.

(*w*) See as to these powers, sects. 4 (8) and 23 of the Act of 1882.

(*x*) For investment clauses, see *ante*, pp. 545, 554, 558, and 562.

XXXVI. Marriage Settlement of Wife's Freeholds, Leaseholds, &c.

raise money on mortgage for purposes not specified in Settled Land Acts;

person having under any of the Acts aforesaid [*or*, under the Settled Land Act, 1882, or any other Acts or Act for the time being in force relating to settled lands] the powers of a tenant for life of, or over the hereditaments hereby settled may raise any sum or sums of money not exceeding in the whole the sum of £——, to be secured by mortgage of or charge upon all or any of the hereditaments hereby settled, with interest for the same at any rate not exceeding 5 per cent. per annum for the purpose of, &c. [*e.g.*, making any improvements authorised by section 25 of the Settled Land Act, 1882]; And for the purpose last hereinbefore mentioned such tenant for life or other person as aforesaid shall have the same powers in all respects as he or she would have if the money to be raised in exercise of the powers last hereinbefore contained were required for one of the purposes for which a tenant for life is by section 18 of the Settled Land Act, 1882, empowered to raise money on mortgage:

protection of mortgagees.

PROVIDED ALWAYS that no person lending money purporting to be borrowed in exercise of this power shall be concerned to inquire as to the purpose for which it shall be alleged to be borrowed, or bound to see to the application thereof, or as to the propriety, regularity, or extent of any exercise of this present power; and no such mortgage or charge purporting to be made in exercise of this present power shall be in any way invalidated or affected by any impropriety or irregularity to the prejudice of the person or persons taking any such mortgage or charge or any persons claiming under him or them: And that the money which shall be borrowed in exercise of this power may and shall be applied in or towards payment, for, &c., [*e.g.*, any such improvement as aforesaid] and subject thereto shall be deemed to be capital money arising under the Settled Land Act, 1882, or any other Acts or Act in force relating to settled lands, and be applicable accordingly:

Power to effect improvements without any certificate or order of Court.

EIGHTHLY, any capital money arising under the Settled Land Act, 1882, or any other Act or Acts for the time being relating to settled lands may be applied in payment for any improvement authorised by the same Acts or any of them according to a scheme for the execution thereof to be prepared by or on behalf of the trustees or trustee for the time being of the hereditaments hereby settled, or submitted by the tenant for life or person having the power of a tenant for life of or over the same hereditaments for approval, and approved by such trustees or trustee without any such certificate or order as is

XXXVI. Marriage Settlement of Wife's Freeholds, Leaseholds, &c.

mentioned in section 26 of the Settled Land Act, 1882; AND NINTHLY, if at any time, and so long as there shall be only one trustee of the settlement hereby created, such sole trustee may exercise all or any of the powers conferred on trustees of a settlement by the Acts aforesaid or any of them, and may receive and give effectual receipts for capital monies arising thereunder or otherwise receivable under any of the trusts, powers, and provisions of these presents relating to the hereditaments hereby settled; And all notices under any of the same Acts given to such sole trustee shall be to all intents and purposes as valid and effectual as if given to two or more trustees of the settlement hereby created; PROVIDED ALSO and it is hereby agreed and declared that, notwithstanding any rule of equity to the contrary, upon any sale, exchange, or lease of any lands and hereditaments hereby settled, or of any easements or other rights or privileges appurtenant thereto or in connection therewith, made in exercise of any of the powers conferred by the Settled Land Act, 1882, or any other Acts or Act for the time being in force relating to settled lands, Any person being a tenant for life within the meaning of the same Acts, for the time being exercising such power shall be fully competent with the consent in writing of the said trustees or trustee of this settlement to purchase or take in exchange or on lease (as the case may be) any part of such settled lands, hereditaments, and premises at a price, or with or subject to the receipt or payment by him of such sum for equality of exchange, or at such rent or rents (as the case may be) as may be agreed upon by the person exercising the power of the one part, and the said trustees or trustee of this settlement of the other part, or to be ascertained and determined by two valuers to be appointed by such respective parties, and the umpire of such valuers, in the usual manner; AND shall also be fully competent to direct that any sum or sums being capital money arising under the Settled Land Acts in respect of any of the said lands and hereditaments hereby settled, or

Power for a sole trustee to act.

Power for tenants for life to purchase, or take in exchange or on lease any settled lands (*y*).

(*y*) The insertion of powers of this nature seems to be generally advisable in a strict settlement, having regard to the fiduciary position in which tenants for life exercising the statutory powers of sale, &c., are placed by sect. 53 of the Settled Land Act, 1882, *ante*, p. 488. See on this point, *ante*, sub tit. "PURCHASES," Vol. V., pp. 95 *et seq.*, and the notes at pp. 960 *et seq.* of Vol. VII. sub tit. "WILLS," where a similar power is inserted.

XXXVI. Marriage Settlement of Wife's Freeholds, Leaseholds, &c.

any easements, or other rights or privileges appurtenant thereto, or connected therewith, shall be invested and applied in the purchase, at a price to be determined in manner hereinbefore mentioned, of any lands and hereditaments, and easements or other rights or privileges appurtenant thereto or connected therewith, convenient to be held or enjoyed with the lands and hereditaments hereby settled or any part thereof, notwithstanding that the person giving such direction may be possessed of or entitled to the lands, hereditaments, or other premises directed to be purchased, for an absolute or any less beneficial estate or interest, and either solely, or jointly with some other person or persons, or in payment of any equality money so to be agreed on or determined as aforesaid to be paid to the person giving such direction upon any such exchange as is hereinbefore provided: But so that any lands, hereditaments, easements, rights or privileges acquired by any such purchase or exchange shall be conveyed or assured to the uses, upon the trusts, and with and subject to the powers and provisions hereinbefore limited, declared, and contained respectively concerning the lands and hereditaments hereby settled, or such of the same uses, trusts, powers and provisions as shall for the time being be subsisting and capable of taking effect: AND it is further declared that no such trustee of the settlement hereby created shall be in any way liable for adopting in good faith any such purchase or exchange as last aforesaid, or concerned to inquire as to the propriety thereof:

Protection of trustees.

Second *testatum.*

Assignment of leaseholds.

AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement, and for the consideration aforesaid the said [*wife*], with the approbation of the said [*husband*] hereby assigns, and as settlor conveys unto the said [*general trustees*] ALL that the messuage or dwelling-house, and all and singular other the premises comprised in or expressed to be demised by the hereinbefore recited indenture of lease: TO HOLD all the premises hereby assigned unto the said [*general trustees*], their executors, administrators, and assigns, henceforth for all the residue now unexpired of the said term of —— years therein granted by the same indenture of lease, at and under the rent, covenants, and conditions by and in the said indenture of lease reserved and contained, and on the part of the lessee to be paid, observed and performed, UPON TRUST out of the rents and profits of the premises hereby assigned to pay the rent and observe and

Habendum: to trustees;

upon trust to pay rents, &c.;

XXXV Marriage Settlement of Wife's Freeholds, Leaseholds, &c.

perform the covenants and conditions by and in the said lease reserved and contained, and on the part of the lessee to be paid, observed and performed: AND, subject thereto, upon such trusts, and with and subject to such powers, provisions and declarations as shall as nearly correspond with the uses, trusts, powers, provisions and declarations hereinbefore limited, declared and contained of and concerning the premises hereinbefore expressed to be hereby granted, as the different nature and quality of the premises will permit, but not so as to increase or multiply charges or powers of charging (*z*), and so that the leasehold premises shall not vest absolutely in any person hereby made tenant in tail male or in tail by purchase of the hereditaments and premises hereinbefore expressed to be hereby granted, unless he shall attain the age of twenty-one years, but on his death under that age shall go in the same manner as if they had been freeholds of inheritance included in the grant hereinbefore contained (*a*): PROVIDED ALWAYS, and it is hereby agreed and declared that the said trustees or trustee of this settlement shall be the trustees or trustee of the settlement hereby created for all the purposes of the Settled Land Acts, 1882 to 1889, and of any other Act or Acts for the time being in force relating to settled lands, and also for the purposes of section 42 of the Conveyancing and Law of Property Act, 1881: PROVIDED ALWAYS and it is hereby agreed and declared that the statutory power of appointing a new trustee or new trustees of the said terms of 99 years and of 500 years respectively, or either of them, and of appointing a new trustee or new trustees of this settlement, when and so often as a vacancy shall occur in any of the said several classes of trustees respectively, shall be vested in the said [*husband*] and [*wife*] jointly during their joint lives, and by the survivor of them during his or her life, and after the death of such survivor, in the person, &c. [*Continue as at* p. 698; *Trustee Clauses, ante*, p. 552].

and subject thereto upon trusts corresponding to uses of settled freeholds.

Appointment of trustees for purposes of Settled Land Acts, and of Conveyancing &c., Act, 1881 sect. 42.

Power to appoint new trustees of terms and of settlement.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

(*z*) As to multiplication of charges, see *Hindle* v. *Taylor*, 5 De G. M. & G. 577.

(*a*) If desired, the vesting may be further deferred, as in Precedent XXXV., *ante*, p. 697.

XXXVII. *RESETTLEMENT of* FREEHOLDS *by a* FATHER *and* ELDEST SON *on the* MARRIAGE *of the latter.* LIMITATION *of a* RENT-CHARGE *to the intended* HUSBAND, *and of* JOINTURE RENT-CHARGES *to the intended* WIFE. *Subject thereto to the* FATHER *for* LIFE, *remainder to the intended* HUSBAND *for* LIFE, *remainder (subject to a term for securing* PORTIONS) *to his* FIRST *and* OTHER SONS *in* TAIL MALE, *with remainders comprising* LIMITATIONS *to the husband's* YOUNGER BROTHERS *for* LIFE *and their respective* ISSUE *in* TAIL MALE; *with similar* LIMITATIONS *in* TAIL. NAME *and* ARMS *Clause.* SHIFTING *Clause carrying over Settled Lands on* ACCESSION *to* TITLE *and* FAMILY ESTATES. POWERS *of* JOINTURING *and* CHARGING PORTIONS. APPOINTMENT *of* MONIES, *&c., to follow* USES *of* FREEHOLDS.

Parties

THIS INDENTURE (*b*), made the —— day of ——, 18—, BETWEEN [*father of intended husband*], of, &c., of the first part; [*intended husband*], of, &c., of the second part; [*intended wife*], of, &c., of the third part; [*general trustee*], of, &c., [*general trustee*], of, &c., and [*general trustee*], of, &c., of the fourth part; and [*trustee of term*], of, &c., and [*trustee of term*], of, &c., of the fifth part: WHEREAS [*recite intended marriage, ante*, p. 699]; AND WHEREAS by an indenture dated, &c., and made between [*parties*] (being a settlement made in consideration of the marriage then intended, and afterwards solemnized between the said [*father*] and [*mother*]), the manors, lands, tithe rentcharges, and hereditaments described in the schedule thereunder written were granted and conveyed unto the said [*grantees*], and their heirs, to the use of the said [*father*], his heirs and assigns, until the solemnization of the then intended marriage, and thereafter to the use of [*trustees of term for securing pin-money*] for the term of 99 years, upon the usual trusts for securing the yearly sum of £—— by way of pin-money for the said [*mother*], with remainder to the use of the said [*father*] and his as-

Recitals: settlement on marriage of husband's parents;

(*b*) Stamp 10*s.* in respect of the lands, and *ad valorem* duty on the monies, &c., to be settled.

XXXVII. Resettlement with Limitations to Collaterals.

signs for his life without impeachment of waste, with remainder to the use that the said [*mother*] (if she should survive the said [*father*]) should out of the same premises receive for her life a yearly rentcharge of £——, with the usual powers of distress and entry, and other remedies for recovering payment of the rentcharge when in arrear, and, subject as aforesaid, to the use of [*trustees of term for securing rentcharge*], their executors, administrators, and assigns, for the term of 200 years, upon the trusts in the same indenture mentioned for securing the payment of the rentcharge; and, subject as aforesaid, to the use of [*trustees of portions*], for the term of 1,000 years, upon the trusts in the same indenture mentioned for raising for the portion or portions of the child or children of [*father*] by the said [*mother*] (other than an eldest or only son), if there should be but one such child, the sum of £——, and if there should be more than one such child, the sum of £——, with provisions for the maintenance, education, and advancement of such child or children, with remainder to the use of the first and other sons of the said [*father*] by the said [*mother*] in tail male, with divers remainders over: And in the indenture now in recital are contained powers of sale and exchange as therein mentioned, and it was thereby declared that the monies to arise from any such sale should be laid out in the purchase of other lands and hereditaments to be settled to the like uses: And whereas since the date of the said indenture of settlement, from time to time, certain of the lands and hereditaments therein comprised have been sold and exchanged for other lands and hereditaments, and enfranchisements have been made of copyhold hereditaments holden of the several manors originally comprised in, or which have become subject to the uses and trusts of the said indenture of settlement under the powers in that behalf contained in the same indenture or under statutory powers, and the proceeds of such sales and capital monies received in respect of such exchanges and enfranchisements have been from time to time laid out and invested partly in the purchase of other lands and hereditaments, which have been conveyed to the uses of the settlement created by the said indenture, and partly in the several stocks, funds, and securities hereinafter mentioned, which, or such of them as had not been previously laid out, were immediately before the

powers of sale, &c.;

sale and exchange of lands under powers in recited settlement;

XXXVII. Resettlement with Limitations to Collaterals.

execution of the indenture hereinafter recited liable to be laid out in the purchase of lands and hereditaments, to be so conveyed as aforesaid: AND WHEREAS the lands and hereditaments now subject to the uses and trusts of the said indenture are particularly described in the first schedule hereunder written, and the several monies, stocks, funds, and securities which now represent the proceeds of such sales and capital monies as aforesaid respectively, are specified in the second schedule hereunder written: AND WHEREAS the said [*husband*] is the first son of the said [*father*] by the said [*mother*], and attained the age of twenty-one years on the —— day of ——, 18—, and there have been issue of the said [*father*] by the said [*mother*] —— children and no more, of whom ——, namely [*names*], have attained the age of twenty-one years, and the remaining ——, namely [*names*], are now infants and unmarried; AND WHEREAS, upon the treaty for the said intended marriage, it was agreed that the said lands and hereditaments described in the said first schedule hereunder written should be resettled to the uses, and in manner hereinafter appearing: AND WHEREAS, in pursuance and part performance of the said agreement, by an indenture dated the —— day of ——, 18—, and enrolled and perfected as a disentailing assurance, or intended so to be, and made between the said [*father*] of the first part, the said [*husband*] of the second part, and [*grantee to uses*] of the third part, the lands and hereditaments described in the said first schedule hereunder written, and all other (if any) the hereditaments subject to the subsisting uses of the said indenture of settlement of the —— day of ——, 18—, now stand limited, subject to the uses, estates, and powers limited or declared by, and subsisting in the same premises by virtue of the said indenture of settlement of the —— day of ——, 18—, and which preceded the estate in tail male of the said [*husband*], other than the use limited to the said [*father*] for his life (*c*), and to the uses and estates limited or to be limited in exercise of such powers, to such uses, and upon, with and subject to such trusts,

lands now subject to the settlement;

state of family:

agreement for marriage and resettlement;

disentailing assurance;

(*c*) These uses include the limitations of pin-money and jointure rentcharge in favour of the intended husband's mother and of a term for securing portions for his younger brothers and sisters, so that there is no necessity to insert such uses in the present settlement. For a somewhat different recital of a disentailing assurance, see next Precedent, *post*, p. 737.

XXXVII. Resettlement with Limitations to Collaterals.

powers, provisions, and declarations as the said [*father*] and [*husband*] shall by deed appoint, and in default of such appointment, and so far as no such appointment shall extend, to the uses, and upon, with and subject to the trusts, powers and declarations to which the premises would have stood limited, if the indenture now in recital had not been executed; AND by the indenture now in recital the said several monies, stocks, funds, and securities specified in the said second schedule hereunder written now stand limited, subject to the uses aforesaid, which preceded the said estate tail of the said [*husband*], other than the use limited to the said father during his life, &c. [*ut supra*] to the like uses, upon the like trusts and subject to the like powers and provisions as were thereinbefore declared and contained concerning the said premises thereby limited, or as near thereto as circumstances would permit; AND WHEREAS the said several monies, stocks, funds, and securities specified in the said second schedule hereunder written, are intended respectively to be forthwith paid to and transferred into the names of the said [*general trustees*], to the intent that the same may be held by them to the uses, upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same: AND WHEREAS the said [*father*] and [*husband*], after full consultation and consideration of their respective rights and interests in the premises and other circumstances (*d*), have agreed to make such settlement as is hereinafter contained of the manors, messuages, lands, hereditaments, monies, stocks, funds, securities, and premises described in the said schedules hereunder written, and all other (if any) the hereditaments and premises which are now subject to the joint power of appointment contained in the said indenture of the —— day of ——, 18— (*the disentailing assurance*): NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said now intended marriage, and in exercise of the power in this behalf given to them by the said indenture of the —— day of ——, 18—

intended transfer to trustees of investments;

agreement for re-settlement.

Testatum.

(*d*) See as to the importance that on a resettlement of real estate the son should be fully advised as to his position and rights under the original settlement, *ante*, pp. 379 *et seq.* The rule that if the father derives any benefit for himself from the transaction the son should be *separately* advised, has recently been expressly re-affirmed by *Cotton*, L.J., in *Tucker* v. *Bennett*, 38 Ch. D., at p. 9; see also *Hoblyn* v. *Hoblyn*, 41 Ch. D. at p. 205.

XXXVII. **Resettlement with Limitations to Collaterals.**

[*disentailing deed*], and of every other power them hereunto enabling, they, the said [*father*] and [*husband*], as settlors, hereby appoint that all the messuages, lands, and hereditaments described in the first schedule hereunder written, and all other (if any) the hereditaments which, immediately before the execution of the indenture of the —— day of ——, 18— [*disentailing deed*], were subject to the then subsisting uses of the hereinbefore recited indenture of settlement, shall immediately after the execution of these presents, subject to the uses, estates and powers, subsisting in the same premises by virtue of the said indenture of settlement, and which immediately preceded the estate in tail male of the said [*husband*] other than the use limited to the said [*father*] for his life, and to the uses and estates limited or to be limited in exercise of such powers, remain and be, until the solemnization of the intended marriage, To THE USES, upon the trusts, with and subject to the powers and provisions to, upon, and subject to which the premises stood limited immediately before the execution of these presents; and from and after the solemnization of the said intended marriage [To SUCH USES, upon such trusts, and with and subject to such powers and provisions as the said [*father*] and [*husband*] shall from time to time by any deed or deeds revocable or irrevocable jointly appoint; And in default of such appointment and so far as no such appointment shall extend (*f*)] To THE USE that the said [*husband*] may during the joint lives of himself and the said [*father*] receive the yearly rentcharge of £—— to be charged upon and issuing out of the premises hereby settled, and to be payable by equal quarterly payments without any deduction, the first of such payments to be made at the end of three calendar months of the intended marriage if the said [*husband*] shall then be living; AND TO THE FURTHER USE that if the said [*husband*]

Appointment (*e*).

Parcels.

To subsisting uses until the marriage.

Afterwards, to the use that intended husband may receive a rentcharge for his life.

And that the

(*e*) For a form of resettlement by appointment and grant, see next Precedent, *post*, p. 738.

(*f*) It is sometimes thought advisable to insert here a joint power of appointment overruling all the limitations of the resettlement including the father's life estate, so as to enable the father and eldest son jointly to dispose of the fee simple in possession, and to receive and apply the monies receivable without the intervention of the trustees of the settlement, and for purposes to which capital monies arising under the Settled Land Acts are not applicable. See as to the advisability of inserting such a joint power of appointment, or a power of revocation, *Welman* v. *Welman*, 15 Ch. D. at p. 576.

XXXVII. Resettlement with Limitations to Collaterals.

shall die in the lifetime of the said [*wife*], she may from and after the death of the said [*husband*] receive during her life the yearly rentcharge or rentcharges following (that is to say), if and so long as the said [*father*] shall be living, the yearly rentcharge of £——, and after the death of the said [*father*] the yearly rentcharge of £——, to be respectively charged upon and issuing out of the premises hereby settled, and to be payable by equal quarterly payments without deduction, except succession duty (*g*), the first of such payments, as to the rentcharge of £——, to be made at the end of three calendar months after the death of the said [*husband*], if the said [*wife*] and [*father*] shall then be living, and as to the rentcharge of £——, to be made at the end of three calendar months after the death of the survivor of them the said [*father*] and [*husband*], if the said [*wife*] shall then be living, such yearly rentcharges limited to the said [*wife*] to be in full of her jointure and in bar of all dower or freebench: PROVIDED ALWAYS that if the said [*wife*] shall not, during the said intended coverture, have power to dispose of or charge the said rentcharges respectively, by way of anticipation: AND, subject and charged as aforesaid, To THE USE of the said [*father*] for his life without impeachment of waste, in restoration and continuation of the former life estate of the said [*father*] limited to him by the hereinbefore recited indenture of settlement of the —— day of ——, 18—; And, after the decease of the said [*father*], To THE USE OF the said [*husband*], for his life without impeachment of waste: AND, after the decease of the said [*husband*], To THE USE of the said [*trustees of term*], their executors, administrators, and assigns, for a term of 500 years, to commence from the death of the survivor of them the said [*father*] and [*husband*], without impeachment of waste, upon the trusts, and with and subject to the powers and provisions hereinafter declared concerning the same; AND from and after the determination of the same term, and in the meantime subject thereto, and to the trusts thereof, To THE USE of the first and other sons of the said [*husband*] successively according to the seniority and the heirs male

wife may receive rentcharges by way of jointure.

Remainder to use of father for life.

Remainder to use of intended husband for life.

Remainder to use of trustees for 500 years.

Remainder to use of first and other sons of hus-

(*g*) This exception is here introduced because the property is not that of the husband alone, and the first mentioned rentcharge will necessarily be payable out of the rents and profits to which the father is entitled for his life. See, as to this, *Lord Braybrooke* v. *Att.-Gen.* 9 H. L. C. 150.

XXXVII. **Resettlement with Limitations to Collaterals.**

of their respective bodies, with remainder To THE USE of the first and other sons of the said [*husband*] successively according to seniority and the heirs of their respective bodies; with remainder to the use of the first and other daughters of the said [*husband*] successively according to seniority and the heirs of their respective bodies; with remainder [*similar limitations to the use of living younger brothers of the husband for life and their issue in tail*]; with remainder To THE USE of every son of the said [*father*] hereafter to be born successively according to seniority and the heirs of their respective bodies; with remainder [*limitations successively to the use of living younger sisters for life and their issue in tail and of his after-born sisters in tail, with remainders to the use of other collaterals and their issue*]; with remainder To THE USE of the said [*husband*] his heirs and assigns: PROVIDED ALWAYS, and it is hereby agreed and declared, that every person who after the determination of the life estate of the said [*husband*] shall under or by virtue of the limitations hereinbefore contained or of this proviso, become entitled beneficially to the possession or receipt of the rents and profits of the said manors, lands, and hereditaments hereinbefore settled as tenant for life, or tenant in tail male or in tail by purchase, and who shall not then use and bear the surname and arms of——, shall within the space of one year next after he or she shall so become entitled, or (being an infant) within one year after he or she shall attain the age of twenty-one years, And that every person to whom any female so becoming entitled as aforesaid shall be married, or whom she shall afterwards marry, not being a peer or the eldest son of a peer, shall, within one year next after such female shall so become entitled or shall so marry, whichever of such events shall last happen (unless in the said respective cases any such person shall be prevented by death), take upon himself or herself and use on all occasions the surname of—— either alone or in addition to his or her other surname (but so that the name of—— shall be the last and principal name), and shall assume the arms of—— either alone or quarterly with his or her family arms: AND shall within such one year apply

band in tail male, and in tail;

further limitations in strict settlement(*h*).

Name and arms clause.

(*h*) The frame of strict settlements varies considerably, according to the wishes of the parties. In the present Precedent the issue of the eldest son are exhausted before any limitations are inserted in favour of his younger brothers and sisters. For another form of limitations, see next Precedent, *post*, p. 742.

XXXVII. Resettlement with Limitations to Collaterals.

for and endeavour to obtain a licence from the Crown, or take such other steps as may be necessary to enable and authorize him or her respectively so to take and use the surname of——, and to assume and bear the arms of——as aforesaid (*hh*): And that in case any person who shall so become entitled as aforesaid, or such husband as aforesaid of any such person, being a female, shall refuse or neglect within such one year to take and use such surname, or to assume such arms, or to take such steps as aforesaid, or shall at any time afterwards discontinue to use such surname or to bear such arms, then and in every such case from and after the expiration of such one year, or immediately after such discontinuance as aforesaid (as the case may be), if the person who or whose husband shall so for the time being refuse, neglect or discontinue as aforesaid, shall be a tenant for life, the limitations hereinbefore contained to the use of such person during his or her life shall absolutely determine and be void; AND if the person who or whose husband shall so, for the time being, refuse, neglect or discontinue as aforesaid, shall be tenant in tail male or in tail by purchase, then the limitations hereinbefore contained under which such person shall be so tenant in tail male or in tail, and in case of such person being tenant in tail male, then also the limitations hereinbefore contained to him in tail, shall absolutely determine and be void; AND in the said respective cases the manors, lands, and hereditaments hereby settled shall immediately go over in the same manner as if such person, being tenant for life, were actually dead, or, being tenant in tail male or in tail, were actually dead, and there was a general failure of his or her issue, without prejudice nevertheless to, but not so as to accelerate any jointure or jointures, portion or portions, sum or sums of money, lease or leases, sale or sales, exchange or exchanges, partition or partitions, or appointment or appointments of new trustees, which, previously to such determination, shall have been charged, granted or made under any of the powers for those purposes herein contained or given by any statute: PROVIDED ALWAYS, that the determination of the estate of any tenant for life by virtue of the proviso hereinbefore contained shall not exclude or prejudice any of the contingent remainders hereinbefore limited to his or her sons and daughters respectively or any other persons,

Penalty for neglect to assume name and arms.

Contingent remainders not to be prejudiced.

(*hh*) See as to this, *Austen* v. *Collins*, W. N., 1886, p. 91.

XXXVII. **Resettlement with Limitations to Collaterals.**

but that so long as any such remainder shall be so contingently subsisting and capable of taking effect, the said manors, lands, and hereditaments hereby settled shall remain and be To the use of the said [*general trustees*], their heirs and assigns, during the remainder of the life of the tenant for life whose estate shall have so determined as aforesaid, Upon trust, that immediately from and after such determination as aforesaid of such estate for life, and during the suspense and contingency of any such expectant remainders, the said trustees or trustee of this settlement shall pay and apply the rents and profits of the premises unto the person or persons for the time being entitled under or by virtue of the limitations and provisions hereinbefore contained to the then first vested estate in remainder expectant on the death of such person as aforesaid: Provided always, and it is hereby agreed and declared, that, if at any time or times after the determination of the life estate in the said hereditaments and premises hereby settled hereinbefore limited to the said [*father*] in restoration of his former life estate therein, the title and dignity of Earl of [A.], together with the [A.] family estates of Lord A. in the county of X., or any of them, or any lands, hereditaments, or other property, which may by any means have become substituted for the said family estates or any of them (hereinafter called "the family estates"), or any part or parts thereof respectively, (the same part or parts being at the least equal in value to the said manors, hereditaments, and premises hereby settled, after allowing for such incumbrances as may affect the same premises respectively), should, by any means whatsoever (*i*), come to or devolve upon any person hereby made tenant for life of the hereditaments and premises hereby settled, and, as to the said family estates, for an estate for his life, or any other estate of freehold, or inheritance in possession, or upon any person hereby made tenant in tail male or in tail by purchase of the said hereditaments and premises hereby settled, and as to the said family estates, for an estate in tail male, or any other estate of inheritance in possession, so that the person acquiring the said family estates shall be entitled in respect thereof to the actual possession or the receipt of

Shifting clauses carrying over settled lands on accession to family title and estates with provisoes to meet the case of a previous exercise of the powers of jointuring or charging portions.

(*i*) If the shifting clause refers only to family estates irrespective of a title, insert here the words "except by means of a purchase for value."

XXXVII. Resettlement with Limitations to Collaterals.

the rents and profits of the premises therein comprised, Then, and so often as the same shall happen, the uses or estates for life, or in tail male or in tail (as the case may be), hereinbefore limited or appointed of or in the said hereditaments, and premises hereby settled, to or for the benefit of the person acquiring as aforesaid the said title and family estates, or such part or parts thereof as aforesaid, and all powers annexed to the same uses and estates respectively, but not any uses, estates, and charges which shall have been limited, or created in exercise of such powers, or any of them (except as hereinafter is otherwise provided), or of any statutory power, shall absolutely cease and determine; And from and after such cesser or determination, the said hereditaments and premises hereby settled shall go over and devolve to the uses, upon the trusts, and with and subject to the powers and provisions (but subject and without prejudice to the uses and estates preceding the uses or estates so ceasing or determining as aforesaid, and to the powers annexed to such preceding uses and estates, and all uses, estates, and charges which shall have been limited or created in exercise of such powers or any of them) to, upon, subject, with, and subject to which the same hereditaments and premises would have stood limited and settled by virtue of these presents if such person so acquiring the said family estates or such part or parts thereof as aforesaid, being a tenant for life of the said hereditaments and premises hereby settled were then dead, or, being a tenant in tail male or in tail thereof, were then dead without leaving any issue capable of inheriting under the limitations in tail male or in tail herein contained; Save and except that, if, at the time when the said title and family estates shall come to or devolve upon any person hereby made tenant for life, there shall not be in existence any child of such person capable of taking the next vested estate in remainder under the limitations hereinbefore contained, then the cesser or determination of the estate of such person so directed to cease or determine as last aforesaid, shall, during the remainder of his life, or until the birth of such child, be suspended and shall not take place (*ii*); PROVIDED ALSO, and it

Reverter clause.

(*ii*) See *Fazakerly* v. *Ford*, 4 Sim. 390. If preferred, a proviso similar to that at the end of the Name and Arms Clause (*ante*, p. 719) may be substituted for this saving clause.

XXXVII. **Resettlement with Limitations to Collaterals.**

is hereby agreed and declared, that, if by virtue of the shifting clause hereinbefore contained, the ultimate limitation of the hereditaments and premises hereby settled to the use of the said [*husband*], his heirs and assigns would but for this present provision take effect in possession either absolutely or subject to any uses or estates, or charges limited or created by these presents or by exercise of any powers hereby conferred, or of any statutory power, then and thereupon, the said hereditaments and premises hereby settled shall immediately revert and remain to the uses upon the trusts and with and subject to the powers and provisions, to, upon with and subject to which the same hereditaments and premises would have stood limited if the said shifting clause had not been herein contained: PROVIDED ALWAYS, and it is hereby further agreed and declared that, if at the time when the said family estates, or such part or parts thereof as aforesaid, shall come to or devolve upon any person hereby made tenant for life as aforesaid, the power of jointuring hereinbefore contained, shall have been exercised by him in favour of any then existing wife, and the estate acquired by him in the said family estates, or such part or parts thereof as aforesaid, shall either be an estate of inheritance, or, being only an estate for life, shall be accompanied with a power of jointuring exerciseable in favour of the said then existing wife, to the full extent to which the said power of jointuring herein contained shall have been exercised in her favour, and so that she might derive the same benefit from an exercise of the power so acquired as from the grant, limitation, or appointment then already made under the said power of jointuring herein contained, then, and in every such case, the rentcharge, or rentcharges, which shall have been granted, limited, or appointed under the said power of jointuring herein contained, and all powers and remedies, and terms of years, which shall have been granted, limited, or appointed for securing the payment of the same, shall absolutely cease and determine; But, if the power of jointuring accompanying any such estate for life as aforesaid, shall not be exercisable in favour of the then existing wife to the full extent to which the said power of jointuring herein contained shall have been already exercised in her favour, and so that she might derive the same benefit from an exercise of the power so acquired as from the grant, limitation, or appoint-

Proviso to meet the case of a previous exercise of power of jointuring.

XXXVII. Resettlement with Limitations to Collaterals.

ment then already made in her favour under the said power of jointuring herein contained, then, and in such case, the rentcharge, or rentcharges, which shall have been so granted, limited, or appointed in her favour as aforesaid, or the powers or remedies, or terms of years, which may have been granted, limited, or appointed, for securing the payment of the same, shall not cease or determine, but so much only of the same shall from time to time be raisable, or payable, for the benefit of the then existing wife, as, in addition to any rentcharge, or rentcharges, which may or might be granted, limited, or appointed in her favour, under the power of jointuring so acquired as aforesaid (if exercised to its full extent), would be sufficient to make up the full amount of the said rentcharge, or rentcharges, which shall have been so limited, granted, or appointed as aforesaid, under the said power of jointuring herein contained, and the residue thereof shall from time to time absolutely sink for the benefit of the person or persons for the time being entitled under the limitations hereinbefore contained to the possession or the receipt of the rents and profits of the hereditaments and premises, hereby settled; PROVIDED ALSO, and it is hereby further agreed and declared, that if at the time when the said family estates, or such part or parts thereof as aforesaid, shall come to or devolve on any person hereby made tenant for life, the power of charging with portions herein contained shall have been exercised by him in favour of any child or children whether born or unborn, and the estate acquired by him in the said family estates, or such part or parts thereof as aforesaid, shall either be an estate of inheritance, or being only an estate for life, shall be accompanied with a power of charging with portions, exercisable in favour of the said child or children, to the full extent to which the said power of charging hereinbefore contained shall have been exercised in his, her, or their favour, and so that he, she, or they might derive the same benefit from an exercise of the power so acquired as from the charge or charges then already made under the said power of charging herein contained, then, and in every such case, the charge or charges which shall have been so made under the said power of charging herein contained (except as to any sum or sums of money, or interest which shall have been actually raised and paid), and all powers and remedies, and terms of years, which shall have limited or

Proviso to meet the case of a previous exercise of power of charging portions.

XXXVII. Resettlement with Limitations to Collaterals.

created for securing the payment thereof (but subject and without prejudice to any disposition or dispositions which shall have been actually made under the trusts of such term or terms), shall absolutely cease and determine: But, if the power of charging, accompanying any such estate for life as aforesaid, shall not be exercisable in favour of the said child or children to the extent to which the said power of charging herein contained shall have been already exercised in his, her, or their favour, and so that he, she, or they respectively might derive the same benefit from an exercise of the power so acquired as under the charge already made in his, her, or their favour, under the said power of charging herein contained, then and in such case, the charge or charges which shall have been so made, or the powers or remedies, or terms of years, which shall have been limited or created for securing the payment thereof, shall not cease or determine, but so much only of the same charge or charges shall from time to time be raisable or payable for the benefit of such child or children respectively, as in addition to the charge or charges which may or might be charged in his, her, or their favour, under the power of charging so acquired as aforesaid (if exercisable to its full extent), would be sufficient to make up the full amount of the charge or charges which shall have been so made as aforesaid under the said power of charging hereinbefore contained, and the residue of the same charge or charges shall absolutely sink for the benefit of the person or persons for the time being entitled under the limitations hereinbefore contained, to the said hereditaments and premises hereby settled:

Trusts of portions term.

And it is hereby agreed and declared that the said hereditaments and premises are hereby limited to the use of the said [*trustees of term*], their executors, administrators, and assigns, for the said term of 500 years, Upon trust that if there shall be any younger child or children of the said now intended marriage (that is to say, any child or children other than an eldest or only son or any other son or sons, who, before his or their respectively attaining the age of twenty-one years shall become entitled either in possession or remainder under or by virtue of these presents to the said hereditaments and premises for the first estate in tail, or any daughter or daughters, who before her or their respectively attaining that age or marrying shall have

XXXVII. Resettlement with Limitations to Collaterals.

become indefeasibly entitled either in possession or remainder under or by virtue of these presents to the said hereditaments for the first estate in tail (*j*)), who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, then the said [*trustees of term*] or the survivor of them or the executors or administrators of such survivor or other the trustees or trustee for the time being of the said term shall after the death of the survivor of them, the said [*father*] and [*husband*] by mortgage of the hereditaments and premises comprised in the said term of 500 years or any part thereof, or by, or out of the rents and profits thereof or by sale of any timber or minerals, or by all or any of such means, or by any other reasonable means raise for the portion or portions of such younger child or children as aforesaid such sum of money as hereinafter mentioned, &c., [*continue trusts of term of* 500 *years for raising portions, ante,* p. 691, *to be paid (in default of appointment to the contrary) to the children on attaining twenty-one years or marriage,* "if the same respectively shall happen after the death of the survivor of the said [*father*] and [*husband*]; but if the same respectively shall happen during their lives, or the life of such survivor, then immediately after the death of such survivor;" [*Hotchpot clause,* p. 691.]

"AND IT IS HEREBY FURTHER AGREED AND DECLARED, that the said trustees or trustee of this settlement shall after the death of the survivor of them the said [*father*] and [*husband*], &c. [*continue maintenance, &c., clause, ante,* p. 692]: "AND UPON FURTHER TRUST that the said trustees or trustee of this settlement shall after the death of the said [*husband*], or in his lifetime in case he shall so direct by any writing under his hand (but during the lifetime of the said [*father*] with his consent in writing), raise," &c. [*continue advancement clause, ante,* p. 692; *power for* "the said [*husband*] after the death of the said [*father*]" *to require portions to be raised in his lifetime, ante,* p. 692; *power for trustees to create specific securities, and to limit a term,* p. 693; *proviso that surplus rents shall be taken by reversioner,* p. 693]: PROVIDED ALWAYS, AND IT IS HEREBY AGREED AND DECLARED, that it shall be lawful for the said [*husband*] if he shall marry again subse-

Maintenance.

Advancement.

Power for the husband to jointure a future wife.

(*j*) This clause as to daughters should be inserted where, as in the text, the limitations in favour of the eldest son's daughters take precedence of those in favour of his younger brothers, &c.

XXXVII. Resettlement with Limitations to Collaterals.

quently to the now intended marriage, at any time, by deed, revocable or irrevocable, or by will, or codicil, to appoint to any and every woman other than the said [*wife*] whom he may so subsequently marry (and that either before or after any and every such marriage) for her life, or for any less period, any yearly rentcharge or yearly rentcharges by way of jointure, not exceeding in the whole by the year the sum of £——, free from all deductions except for succession duty (*k*) to be charged upon all or any of the said hereditaments and premises hereby settled, and to be paid at such times and in such manner as the said [*husband*] shall direct, but so that no such payment shall be made during the life of the said [*father*] without his consent in writing: and this power of jointuring may be exercised as often as the said [*husband*] shall marry: PROVIDED ALSO, and it is hereby further agreed and declared it shall be lawful for the said [*husband*] if he shall so marry again as aforesaid by deed, revocable or irrevocable, or by will, or codicil (but subject to the life interest of the said [*father*] and to the said term of 500 years, and the trusts thereof), to charge all or any of the said hereditaments and premises hereby settled with the payment of such sum or sums of money as he shall think fit, not exceeding in the several events hereinafter specified the several sums hereinafter mentioned, for the portion or portions of the child or children of the said [*husband*] by any after-taken wife, that is to say: IF there shall be but one such child, the sum of £——, AND IF there shall be but two such children, the sum of £——, AND IF there shall be three or more such children, the sum of £—— [*continue power to charge estates with portions for children of subsequent marriage; power to charge* ("but subject as aforesaid") *yearly sums for maintenance, and sums for advancement, and to limit terms for securing portions, ut ante*, pp. 694 *et seq.*]; PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for every male person hereby made tenant for life (other than the said [*father*] and [*husband*] respectively), either before or after he shall become tenant for life in possession or entitled to the rents and profits of the hereditaments hereby settled (but subject to the uses and estates preceding his estate, and to the powers annexed to such preceding uses or estates, and to the uses or estates limited in exercise of

Power for the husband to charge portions for children of a future marriage.

Power for male tenant for life (other than father and intended husband) to jointure.

(*k*) See as to this, *ante*, p. 717, note (*g*).

XXXVII. Resettlement with Limitations to Collaterals.

such powers), by deed, revocable or irrevocable, or by will or codicil, to appoint to any woman whom he may marry for her life any yearly rentcharge by way of jointure, not exceeding the sum of £——, to be charged upon all or any of the hereditaments hereby settled and to be paid at such times, and in such manner, as the person exercising this power shall deem proper: AND IT IS HEREBY DECLARED, that this power of jointuring may be exercised as often as the person for the time being entitled to exercise the same shall marry: PROVIDED ALWAYS, that no jointure rentcharge appointed in exercise of the power lastly-hereinbefore contained shall actually become a charge upon the hereditaments expressed to be charged therewith or be payable, unless the person who shall have exercised such power shall become tenant for life in possession of the hereditaments hereby settled, or unless some of his issue shall become entitled to the possession thereof, or would have become so entitled if of full age: PROVIDED ALSO, that the hereditaments hereby settled shall not, under the powers of jointuring hereinbefore contained, be at any one time subject to the payment of rentcharges exceeding in the whole the yearly sum of £——, such yearly sum to be inclusive of the rentcharge of £—— hereinbefore limited to the said [*wife*], and of any rentcharge which may be appointed in favour of any future wife of the said [*husband*], so that if by the exercise of the powers of jointuring hereinbefore contained the said hereditaments, or any part thereof, shall for the time being, be charged with a greater yearly sum in the whole than £——, the rentcharge, or such part thereof, by the charge whereof such excess shall have been occasioned, shall, during the continuance of such excess, absolutely sink for the benefit of the person for the time being entitled under the limitations hereinbefore contained to the receipt of the rents and profits of the hereditaments hereby settled, and the rentcharges respectively shall have precedence according to the priority in order of limitation of the estates of the several persons exercising this power (*l*): PROVIDED ALWAYS, that it shall be lawful for every male person hereby made tenant for life (other than the said [*father*] and the said [*husband*] respectively), either before or after he shall be-

No jointure to be charged unless appointor or his issue become entitled in possession.

Estates not to be charged with more than a fixed yearly sum for jointures.

Powers for tenants for life (other than father and intended

(*l*) For a power for a female tenant for life to create yearly rentcharges for her husband surviving her, see next Precedent, *post*, p. 744.

XXXVII. Resettlement with Limitations to Collaterals.

husband) to charge portions.

come tenant for life in possession of, or entitled to the rents and profits of the hereditaments hereby settled (but subject to the uses and estates preceding his estate and to the powers annexed to such preceding uses or estates, and to the uses and estates limited in exercise of such powers), by deed revocable or irrevocable, or by will or codicil, to charge all or any of the hereditaments hereby settled with the payment of any sum or sums of money for the portion or portions of the child or children (other than an eldest or only son, or a son who, by the death of an elder son or sons, shall be or become an eldest or only son) of the person for the time being exercising this power not exceeding, IF there shall be but one such child (other than as aforesaid), the sum of £——, AND IF there shall be but two such children (other than as aforesaid), the sum of £——, AND IF there shall be three or more such children (other than as aforesaid), the sum of £——, to be payable to or amongst such child or children, or any one or more exclusively of the others or other of such children, at such times and in such manner in every respect, and if more than one in such shares, as the person for the time being exercising this power shall in manner aforesaid direct, AND by the same or any other deed, or by will or codicil (but subject as aforesaid), to charge the premises charged with such portion or portions, &c., [see *ante*, p. 695], to commence from such time or times, &c., as the person for the time being exercising this power shall in manner aforesaid direct: AND ALSO by the same or any other deed, &c. [*see ante*, p. 695]: PROVIDED ALWAYS, that no portion which may be charged in exercise of the power lastly-hereinbefore contained shall actually become a charge (see *ante*, p. 727): PROVIDED ALSO, that the said hereditaments and premises hereby settled shall not under the powers of charging portions hereinbefore contained become ultimately liable or subject to the payment of any greater sum of money in the whole than the principal sum of £——, such principal sum to be inclusive of the sums of money hereby charged, or which may hereafter be charged, for the portions of children of the said [*husband*] by the said [*wife*], or by any future wife, so that if by the exercise of the aforesaid powers of charging portions or any of them the hereditaments hereby settled, or any part thereof, would, but for this present proviso, be charged with a greater sum in the whole than £——, the charge or charges creating such excess, shall, during the continuance of such excess, not take

Proviso that estates shall not be charged with more than a fixed sum for portions.

XXXVII. Resettlement with Limitations to Collaterals.

effect as to the portion or portions to be thereby respectively charged, or as to such part thereof as shall form the excess, and charges for portions shall have precedence according to the priority in order of limitation of the estates of the several persons exercising this power: [*add any clauses extending the powers and provisions of the Settled Land Acts as may be thought appropriate and advisable, ut ante*, p. 705]: AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement in this behalf and for the consideration aforesaid, and in further exercise of the power in this behalf given to them by the said indenture of the —— day of ——, 18—, (*disentailing deed*), and of every other power them hereunto enabling, the said [*father*] and [*husband*] hereby appoint that all the monies, stocks, funds, and securities specified in the said second schedule hereunder written, and all other (if any) the monies, stocks, funds, and securities which immediately before the execution of such last-mentioned indenture were subject to the uses or trusts of the hereinbefore recited indenture of settlement shall, immediately after the execution of these presents and so soon as the same premises respectively shall have been so paid to or transferred unto or into the names of the said [*trustees*], subject to the then subsisting limitations, powers, and provisions of the hereinbefore recited indenture of settlement, and which immediately preceded the estate in tail male of the said [*husband*] thereby limited, other than the use limited to the said [*father*] for his life, and to the uses and estates limited or to be limited in exercise of any such powers, be held by and vested in the said [*trustees*], their executors, administrators, and assigns, until the solemnization of the said intended marriage, To THE USES upon the trusts and with and subject to the powers and provisions to which the same premises stood limited immediately before the execution of these presents; And, from and after the solemnization of the said intended marriage, UPON TRUST to convert into money such of the premises lastly hereby appointed as shall not consist of money, and to lay out the said monies in the purchase of freehold or copyhold hereditaments in England or Wales, to be conveyed and settled to the like uses upon the like trusts, and with and subject to the like powers and provisions as are hereinbefore limited, declared, and contained respectively concerning the said hereditaments and premises hereby settled, and to hold, invest, and apply the said monies and premises lastly hereby appointed until the same shall be so

Appointment of monies, stocks, funds, and securities, representing proceeds of sale, &c., to follow uses of freeholds.

to subsisting uses till marriage;

afterwards, upon trust for purchase of lands to be settled;

and meanwhile to hold monies, &c.,

XXXVII. **Resettlement with Limitations to Collaterals.**

laid out, as if the same were capital monies arising under the Settled Land Act, 1882, and receivable for the trusts and purposes of the settlement hereby created, and investments representing such capital monies; But so that no such conversion, purchase, investment, or application as aforesaid shall be made without the consent of, &c. [*specify required consents*]: [*Appointment of trustees for purposes of the Settled Land Acts, and of the Conveyancing, &c., Act*, 1881, *sect.* 42, *ante*, p. 698]: PROVIDED ALWAYS, and it is hereby agreed and declared, that the statutory power of appointing a new trustee or new trustees in the place of the said [*trustees of term*], or either of them, or any future trustees or trustee of the said term, shall be vested in and exercisable by the said [*husband*] during his life; And that the statutory power of appointing a new trustee or new trustees in the place of the said [*general trustees*], or any of them, shall be vested in and exercisable by the said [*father*] and [*husband*] during their joint lives and the survivor of them during his life, and after the death of such survivor in and by the person (if any) for the time being entitled as tenant for life to the possession or receipt of the rents and profits of the hereditaments and premises hereby settled for the time being subject to the subsisting uses of these presents: [*Trustee clauses, ante*, p. 552].

as capital monies under S. L. Acts.

Power to appoint new trustees of term, and new trustees of settlement.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

XXXVIII. *FAMILY RE-SETTLEMENT by a* FATHER *and* ELDEST SON *of* FREEHOLDS *and* LEASEHOLDS, *held under several leases, comprising* MINING PROPERTY, *subject to* PORTIONS *raisable under a* WILL *which created the original Settlement, and* SETTLEMENT *of* FREEHOLDS *subject to* MORTGAGES, *and of* MINING PLANT, *&c., belonging to the* FATHER. RELEASE *by* FATHER'S WIFE *of* JOINTURE *charged under a power in the Will.* LIMITATIONS *of* FREEHOLDS *to uses giving the Father* POWER *to* CHARGE *estates with a sum for his own benefit to recoup Advances made to the Son; and subject thereto to provide* RENTCHARGES

for the Son, *varying in different events; and subject thereto to uses in* Strict Settlement *restoring the Father's powers under the Will, but giving an* Increased Jointure Rentcharge *to his* Wife. Extension *of Statutory* Powers *of* Tenants *for* Life, *&c., as regards* Mining Property. Assignment *of* Leaseholds *upon Trusts to correspond with uses of settled Freeholds.* Assignment *and* Declaration *of* Trusts *of* Mining Plant, *&c.* Release *of* Moneys Advanced *to* Son.

THIS INDENTURE (*m*) made the —— day of ——, 18—, Between [*father*], of, &c., of the first part; [*son*], of, &c., the eldest son of the said [*father*], of the second part; [*mother*], the wife of the said [*father*] of the third part; [*trustee of settlement*], of, &c., and [*trustee of settlement*], of, &c., of the fourth part; and [*trustee of terms*], of, &c., and [*trustee of terms*], of, &c., of the fifth part: Whereas [*testator*], late of, &c., deceased, duly made and executed his will, dated, &c., and thereby devised and bequeathed all his messuages, lands, tenements, and hereditaments at —— in the county of ——, and all his real estate and chattels real whatsoever, to [*trustees of will*], their heirs, executors, administrators, and assigns, according to the tenures and natures of his respective estates for ever, or during all his estate and interest therein, to the use of [*other trustees*], their executors, administrators and assigns for the term of 500 years from the time of his death, without impeachment of waste, upon the trusts thereinafter declared, and, subject thereto, to the use that his wife [*name*] (since deceased) and her assigns might, from the time of his death, during the remainder of her life, receive out of the hereditaments and premises thereinbefore devised, the yearly sum of £——, with powers of distress and entry for recovering payment thereof; and subject to the said yearly sum, and the powers and remedies thereinbefore given for securing the payment thereof, to the use of the said [*father*] and his assigns during his life, with such powers of improvement as therein mentioned, and without impeachment of waste; with remainder to the

Parties.

Recitals: of will creating the original settlement of the estates to be resettled, giving to father power to charge jointure and portions, and to trustees power to sell devised lands, &c.;

(*m*) Stamps, 2*l.* in respect of the properties settled, and 1*l.* in respect of the releases.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

use of the first son of the said [*father*] and the heirs male of the body of such first son, with divers remainders over; and the said testator thereby authorised the said [*father*] by any deed or deeds, or by will or codicil, to appoint any rentcharge or annual sum, issuing out of the said hereditaments and premises thereinbefore devised, or any part thereof, to the use of or in trust for any woman or women whom he should marry, during the life or lives of such woman or women respectively, by way of jointure or jointures, such rentcharge or annual sum to take effect from the death of the said [*father*], but not in any case to exceed the sum of £500 per annum, and, by the same or any other deed or deeds, will or codicil, to give powers of distress and entry for recovering payment of the same, and to limit and appoint the hereditaments and premises chargeable therewith to any trustees or trustee, for any term of years to commence from the death of the said [*father*], and to be determinable as therein mentioned; And the said testator thereby further authorised the said [*father*] by any deed or deeds, or by will, or codicil, to charge the said hereditaments and premises thereinbefore devised and bequeathed, or any part thereof, with the payment of any sum or sums of money, for the portions or portion of any younger sons or daughters of the said [*father*] as therein mentioned, not exceeding £—— for any one such younger child, nor exceeding in the whole £——, with interest as therein provided, with power to limit and create any term of years in the same hereditaments and premises, or any part thereof, for raising and securing the payment of such portion or portions, and such interest as aforesaid; and the said testator thereby declared that the said [*other trustees*] should stand and be possessed of, and interested in the said hereditaments and premises thereinbefore devised and bequeathed, for the term of 500 years therein limited to them as aforesaid, upon trust, in the first place, for payment of his debts, testamentary and personal expenses and legacies, or such part thereof as his personal estate not specifically bequeathed should not suffice to pay, and upon further trust to raise portions for the said testator's younger children in case he should have any (which trust did not take effect by reason of the said testator not having had any child other than the said [*father*]); and in the said will was contained a power for the trustees or trustee for the time being thereof, with the consent of the said [*father*] during his life, to sell the said hereditaments and premises

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

thereinbefore devised and bequeathed, or any part thereof, with a direction that the moneys to arise from any such sale or sales should be laid out in the purchase of other lands or hereditaments of inheritance to be settled to the same or the like uses, or upon the same or the like trusts, and with and subject to the like powers and provisions as were thereinbefore limited and contained concerning the hereditaments and premises so sold as aforesaid; and after certain specific and pecuniary legacies, the said testator by his said will bequeathed all the residue of his money and securities for money, and personal estate and effects unto the said [*trustees of will*], their executors, administrators, and assigns, upon trust that they, or the survivor of them, or the executors or administrators of such survivor, or their or his assigns should realize and convert the same into money, and lay out the proceeds thereof in the purchase of lands or hereditaments of inheritance in like manner and with the like directions and provisions as to settlement and otherwise, as thereinbefore expressed or contained concerning moneys to arise from the sale of his real estates under the power in that behalf thereinbefore contained; And the said testator thereby appointed the said [*trustees of will*] and the said [*father*] executors of his said will: And whereas the said testator duly made and executed a codicil, dated the —— day of ——, 18—, to his said will, which codicil is not material to the purposes of these presents: And whereas the said testator died on the —— day of ——, 18—, without having revoked or altered, save by the said codicil, his said will, and without having revoked the said codicil, and the same will and codicil were on the —— day of ——, 18—, duly proved by the said [*executors*] in the Prerogative Court of the Archbishop of Canterbury: And whereas the real estate and chattels real of or to which the said testator was seised, possessed or entitled at the time of his death, and which have not since been sold, consist of the messuages, lands, tenements, and hereditaments particularly specified in the first schedule hereunder written, in the first part of which schedule are specified such of the same premises as are of freehold tenure, and in the second part of which schedule are specified such of the same premises as are leaseholds, with particulars of the several indentures of lease and other instruments under or by virtue of which the said testator held, or became possessed of the same premises respectively, and the several rents at which the same are

of codicil;

of death of testator, and probate of will:

of particulars of unsold freeholds and leaseholds devised and bequeathed by the said will:

XXXVIII. **Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.**

respectively held and the terms for which the same premises are respectively granted, set opposite to the same respective premises: AND WHEREAS the funeral and testamentary expenses, debts, and legacies of the said testator have long since been paid and satisfied out of the said testator's personal estate, and his residuary personal estate has been duly realised and converted into money by the said [*trustees of will*], and the proceeds thereof, together with the proceeds of the sale of certain parts of the real estate of the said testator, have been laid out in the purchase of the lands and hereditaments specified in the second schedule hereunder written, which same lands and hereditaments have been, by virtue of the several indentures mentioned in the —— column of the same schedule, conveyed and assured to the uses, upon the trusts, and with and subject to the powers and provisions by the said will of the said testator declared and contained concerning the real estates thereby devised in strict settlement: AND WHEREAS, by an indenture of settlement dated the —— day of ——, 18—, and made between [*parties*] (being a settlement made in consideration of the marriage then intended and shortly afterwards solemnized between the said [*father*] and [*mother*]) the said [*father*], in exercise of the power in that behalf given to him by the said will of the said testator as aforesaid, appointed a yearly rentcharge of 500*l.*, to be issuing out of the freehold hereditaments and premises devised by the said will, to the said [*mother*], in case she should survive the said [*father*], with powers of distress and entry; And for securing the payment thereof the said [*father*] thereby appointed the hereditaments and premises thereby charged with the same rentcharge, to the use of the said [*trustees of terms* (*n*)], their executors, administrators, and assigns, for the term of 99 years, to commence from the death of the said [*father*], upon the trusts therein declared for securing the said rentcharge; And by the indenture now in recital, the said [*father*], in exercise of the power in that behalf also given to him by the said will as aforesaid, charged all the freehold hereditaments and premises devised by the said will with the payment of a sum

of payment of testator's debts, &c., and realization of his personal estate and purchase therewith of other lands conveyed to uses of will;

of marriage settlement charging jointure for father's wife, and portions for his younger children.

(*n*) Of course if by reasons of deaths or other circumstances the trustees of this term are not the same as the trustees of the terms created by the present re-settlement, the recitals must be modified accordingly.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

therein specified, varying with the number of children of the said then intended marriage who should become entitled to portions under the provisions therein contained, but not exceeding in the whole £——, for the benefit of the children or child of the said then intended marriage as therein mentioned, and also with the payment by way of interest on the said portions of the annual sum or sums therein mentioned for the maintenance and education of every or any child for the time being entitled to a portion in expectancy as therein mentioned; And by the same indenture, the said [*father*] appointed the said hereditaments and premises thereby charged with the portions and maintenance aforesaid to the use of the said [*trustees of terms*], their executors, administrators, and assigns, for the term of 600 years from the solemnization of the said then intended marriage, upon the trusts therein declared for raising the said portions and annual sums by way of maintenance as therein is mentioned: And whereas [*one of trustees of will*] died on the —— day of ——, 18—: And whereas there has been issue of the said marriage four children and no more, that is to say, the said [*son*], the eldest son, and three younger children, namely, two sons [*names*], and one daughter [*name*]: And whereas the said [*father*] has from time to time purchased out of his own moneys the manor of ——, and several messuages, lands, and hereditaments of considerable value, convenient to be held with the real estates devised by the said will of the said testator, and such manor, messuages, lands, and hereditaments so purchased, which are particularly described in the third schedule hereunder written, are now vested in the said [*father*] for an estate in fee simple in possession, subject nevertheless to the several mortgages affecting the same premises specified in such last mentioned schedule: And whereas the said [*father*] has advanced from time to time various sums for the benefit of the said [*son*], and has agreed to advance and pay various sums of money for which the said [*son*] is now liable, which sums so advanced and agreed to be advanced and paid amount to the sum of 10,000*l.* and upwards: And whereas, in consideration of the said [*father*] having advanced and paid, and agreed to advance and pay the aforesaid sums of money, it has been agreed between the said [*father*] and [*son*], by way of family arrangement, that the entails created by the said will of the said testator, and the remainders and reversions expectant thereon, should be barred, and

of death of trustee of will;

of state of family;

of purchase by father of lands and incumbrances thereon;

of advances made by father to eldest son;

of arrangement for resettlement of estates comprised in the will, and settlement of father's lands;

XXXVIII. **Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.**

that power should be given to the said [*father*] to raise the sum of 12,000*l.* out of the hereditaments and premises hereby assured and settled, out of which sum the said [*father*] should recoup himself the sums so advanced and paid, and agreed to be advanced and paid by him as aforesaid, and that subject thereto and subject to the said jointure, rentcharge, portions, interest, and maintenance money so respectively charged as aforesaid by the hereinbefore recited indenture of the —— day of ——, 18—, or to such of them as shall become payable, and to the securities for the same the said freehold and leasehold hereditaments and premises particularly described in the first and second schedules hereunder written respectively should be resettled in manner hereinafter appearing; And further, that the said [*father*] should bring into settlement in manner hereinafter appearing the said manor, hereditaments, and premises particularly described in the third schedule hereunder written, subject nevertheless to the several mortgages mentioned in the same schedule as affecting the same: And whereas the hereditaments and premises so agreed to be resettled and settled respectively as aforesaid comprise (among other hereditaments) certain collieries, mines, minerals, and quarries, which, as well those whereof he is tenant for life as aforesaid, as those whereof he is absolutely possessed of as aforesaid, the said [*father*] has hitherto worked and is now working, and the said [*father*] is the absolute owner of the plant, machinery, implements, and chattels, employed in working the said collieries, mines, and minerals respectively and hereby assigned, and it has been agreed that he shall bring into settlement in manner hereinafter appearing such last mentioned plant and premises: And whereas it has also been agreed that an increased jointure shall be hereby limited to the said [*mother*] and, in consideration thereof, she has agreed to join in these presents in manner hereinafter appearing for the purpose of releasing the said jointure rentcharge so appointed to her by the said indenture of the —— day of —— as hereinbefore is recited: And whereas it has also been agreed that the said [*son*] his heirs, executors, or administrators, are not in any event to be liable to repay to the said [*father*], his executors or administrators, any of the sums so advanced and paid, and agreed to be advanced and paid by the said [*father*] as aforesaid, or any part thereof or any interest thereon, and that the same shall accordingly be released in manner hereinafter appearing:

and for settlement of lands of father;

of agreement for settlement of mining plant;

of agreement for release of jointure;

of agreement for release of son's liabilities to father:

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

AND WHEREAS in pursuance and part performance of the said agreements, by an indenture dated the —— day of ——, 18—, and enrolled and perfected as a disentailing assurance, or intended so to be, and made between the said [*father*] of the first part, the said [*son*] of the second part, and [*grantee to uses*] of the third part, the said [*father*] and the said [*son*] with the consent of the said [*father*] as protector of the settlement, have granted to the said [*grantee*] and his heirs all the freehold portions of the said messuages, lands, tenements, and hereditaments, particularly described in the first and second schedules hereunder written respectively, and all other (if any) the freehold messuages, lands, tenements, and hereditaments, which had been conveyed to, or which by any means were, immediately before the execution of the indenture now in recital, subject to the then subsisting uses of the said will of the said testator, To hold the same unto the said [*grantee*] and his heirs, subject to the said jointure rentcharge of £500, charged in favour of the said [*mother*], and to the sums raisable for portions and maintenance moneys for younger children, by virtue of the said indenture of the —— day of ——, 18—, and the terms of years and other securities for raising the same jointure rentcharge and portions, but freed from the use by the said will limited to the said [*father*] and his assigns during his life, and from all powers of charging and other powers annexed to such life estate, and also freed from the estate in tail male of the said [*son*], and all other estates in tail male or in tail of the said [*son*] and all estates, rights, interests, and powers to take effect, after the determination or in defeazance of such estates in tail male or in tail, to such uses, and upon, with and subject to such trusts, powers, provisions, and declarations, as the said [*father*] and [*son*] shall by deed jointly appoint, and in default of such appointment, and so far as no such appointment shall extend, to the uses, upon the trusts, and with and subject to the powers, provisions, and declarations therein declared or referred to concerning the same. AND WHEREAS the leasehold premises particularly described in the second part of the said first schedule hereunder written are now vested in [*trustees*] the surviving trustees of the said will of the said [*testator*] for the respective residues of the several terms granted by the

of disentailing assurance (*n*);

of present state of title to leaseholds.

(*n*) See *post*, p. 739, note (*q*). For a recital of a more usual form of disentailing assurance, see *ante*, p. 714.

XXXVIII. **Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.**

several leases specified in the same schedule subject to the rents, covenants, and conditions reserved by and contained in such leases respectively, upon, with, and subject to trusts, powers, and provisions corresponding, as nearly as the nature of the property permits, with the uses, trusts, powers, and provisions, to, upon, with, and subject to which the freehold hereditaments and premises stood limited and settled (other than the charge of jointure and portions affecting such last mentioned premises, under or by virtue of the said indenture of the —— day of ——, 18—), under or by virtue of the said will of the said [*testator*] immediately before the execution of the said indenture of the —— day of ——, 18— (*disentailing assurance*), and which preceded the estate in tail male by the said will limited to the eldest son of the said [*father*], and subject thereto in trust for the said [*son*] absolutely: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreements, and for the considerations aforesaid, and in exercise of the power in this behalf given to them by the said indenture of the —— day of ——, 18— (*disentailing deed*), and of every other power them or either of them hereunto enabling, they the said [*father*] and [*son*] hereby as settlors appoint that all the messuages, lands, tenements, and hereditaments next hereinafter expressed to be hereby granted shall immediately after the execution of these presents, subject nevertheless and freed as hereinafter mentioned respectively, remain and be to the uses, upon the trusts, and with and subject to the powers, provisions, and declarations hereinafter declared and contained concerning the same: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreements, and for the consideration aforesaid, the said [*father*] and [*son*] hereby according to their respective estates and interests as hereinbefore appearing, grant, and as settlors convey, And the said [*mother*] with the consent of the said [*father*] and for the purpose of

First *testatum*.

Appointment of disentailed freeholds.

Second *testatum*.

Grant and release from jointure of disentailed freeholds (*o*).

(*o*) In the case of a re-settlement of family estates, there can seldom be any possibility that the appointment made under the joint power in the disentailing deed should leave any estate which has been barred outstanding, and the grant of the appointed property is very frequently omitted, especially where the joint power of appointment, as here, overrides the father's life estate. But a form of assurance by way of grant as well as appointment is here given, as many practitioners prefer to adopt it, lest it should somehow turn out that an estate has been acquired which does not pass by the appointment.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

releasing from her said rentcharge of £500, all the hereditaments and premises charged therewith as aforesaid, hereby releases and disposes of (*p*) unto the said [*general trustees*] and their heirs, ALL the messuages, lands, tenements, and hereditaments particularly described in the first and second schedules hereunder written which are of freehold tenure, and all other (if any) the freehold messuages, lands, tenements, and hereditaments which immediately before the execution of the said indenture of the —— day of ——, 18— (*disentailing deed*), were subject to the then subsisting uses of the said will of the said testator, TO HOLD the same unto the said [*general trustees*] and their heirs, subject to the sums raisable for portions, interest, and maintenance money by virtue of the said indenture of the —— day of ——, 18—, as hereinbefore is recited, but freed and discharged from the said jointure rentcharge of £500, so limited in favour of the said [*mother*], by the last mentioned indenture as aforesaid, and also freed and discharged from all powers of charging and other powers, vested in the said [*father*], or exerciseable or capable of taking effect during his life, under or by virtue of the said will of the said [*testator*] (*q*): TO THE USES, upon the trusts, and with and subject to the powers, provisions, and declarations hereinafter declared and contained concerning the same: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreements, and for the considerations aforesaid, the said [*father*] with the approbation of the said [*son*], hereby grants, and as settlor conveys unto the said [*general trustees*] and their heirs, ALL THAT the said manor of ——, and all and singular the said messuages, lands, tenements, and hereditaments particularly described in the third schedule hereunder written, TO HOLD the same unto

Third *testatum*.

Grant by father of his lands.

(*p*) The father's marriage having taken place before 1883, this settlement will require acknowledgment by his wife to render the release of her jointure valid. The words "dispose of" are here used, being the term used in the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 77, in speaking of assurances by married women under that Act.

(*q*) The conveyance is made free from the jointure and from these powers, in order to let in before the life estate limited to the father the limitations giving power to charge a gross sum, and providing for rentcharges in favour of the son. In a later part of the deed a fresh rentcharge is given to the father's wife, and his powers are restored, and annexed to his life estate under this settlement.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

the said [*general trustees*] and their heirs, subject, as to such parts thereof as are subject thereto, to the several mortgages mentioned in such last mentioned schedule, and the principal moneys and interest thereby secured respectively, To THE USES, upon the trusts, and with and subject to the powers, provisions, and declarations hereinafter declared and contained concerning the same: AND IT IS HEREBY AGREED and declared that all the hereditaments and premises hereinbefore appointed and granted respectively (hereinafter collectively referred to as "the freehold hereditaments hereby settled") shall remain and be to the uses, upon the trusts, and subject to the powers, provisions and declarations following, that is to say: To THE USE and intent that it may be lawful for the said [*father*] by any deed or deeds, or by will or codicil, to appoint all or any part of the freehold hereditaments hereby settled or any part thereof to any person or persons for any term or terms of years, with or without impeachment of waste, by way of mortgage or charge, for securing to such person or persons, either beneficially, or as a trustee or trustees for such purposes as the said [*father*] shall think fit, any sum or sums not exceeding in the whole £12,000, with interest for the same after any rate not exceeding the rate of 4 per cent. per annum; And subject as aforesaid, To THE USE that the said [*son*] and his assigns may, during the joint lives of himself and the said [*father*], receive the yearly rentcharge of £——, to commence from the date of these presents, and accruing from day to day, but to be payable quarterly on the usual quarter days in every year without any deduction; And to the further use, that if the said son shall marry during the life and with the consent of the said [*father*], then and in such case the said [*son*] and his assigns, during the joint lives of himself and the said [*father*], may receive the further or additional yearly rentcharge of £——, to commence on the day of the solemnization of such marriage of the said [*son*], and accruing from day to day, but to be payable quarterly as aforesaid; And subject to the said rentcharges hereinbefore limited [*add, if desired, limitation of use that son's widow may receive rentcharges by way of jointure, ante*, p. 716; *and continue* "And subject and charged as aforesaid"]: To THE USE of the said [*father*], and his assigns, during his life without impeachment of waste, and with such powers and privileges as is next

Limitation of uses of freeholds.

Power for father to raise by mortgage, &c., a gross sum to recoup advances made to son.

Limitation of rentcharges to son during joint lives of himself and his father.

Limitation of life estate to father.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

hereinafter provided, by way of restoration of the former life estate of the said [*father*], under the said will of the said testator: PROVIDED ALWAYS, and it is hereby further agreed and declared between and by the said parties hereto that, subject to the uses, limitations, and powers hereinbefore limited and contained, and which precede the use or estate hereinbefore limited to the said [*father*] and his assigns during his life, nothing herein contained shall prejudice any of the powers of jointuring, leasing, selling, exchanging, and appointing new trustees or any other power limited or given by the said will of the said [*testator*], and which might if the said indenture of the —— day of ——, 18— (*disentailing deed*), and these presents had not been executed respectively, have been exercised during the life of the said [*father*] under or by virtue of the said will; And that the uses and trusts in these presents limited shall by virtue of the exercise of any of the same powers be overreached in the same manner as if such uses and trusts had been limited in the said will, and had been thereby made subject to be overreached by the exercise of such powers; And it is hereby declared that the hereditaments to be purchased or received in exchange under or in consequence of an exercise of the powers of sale and exchange in the said will contained, shall be settled and assured to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with under and subject to such and the same powers agreements and declarations, as would be subsisting of or in the hereditaments which shall have been so sold or exchanged under the said last mentioned powers of sale and exchange, as if the same had not been so sold or exchanged, but so that if any of the lands so to be purchased or received in exchange shall be held by lease or leases for years, the same shall not vest absolutely in any person who by virtue of the limitations hereinafter contained may become tenant in tail male, or in tail by purchase of the same hereditaments, who shall not attain the age of twenty-one years: And from and after the death of the said [*father*], TO THE USE that if the said [*mother*], shall survive the said [*father*], the said [*mother*] and her assigns shall thenceforth during her life receive the yearly rentcharge of £800, instead of the said rentcharge of £500 charged in her favour by the said indenture of the —— day of ——, 18—, and wherefrom the freehold hereditaments hereby settled are hereinbefore expressed to be so released

Proviso restoring the father's powers under the original settlement.

Estates purchased under old power to be settled as estates sold would have been.

Limitation of increased rentcharge to father's wife.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant. &c.

as aforesaid (*r*), to be in full of her jointure, and in bar of all dower and freebench, and to be charged upon and issuing out of the freehold hereditaments hereby settled, to commence from the day of the death of the said [*father*], and to be considered as accruing from day to day, but to be payable quarterly, the first of such payments to be made at the end of three calendar months after the death of the said [*father*], if the said [*mother*] shall then be living; And subject and charged as aforesaid, To THE USE of the said [*son*] and his assigns during his life without impeachment of waste; And from and after his decease, To THE USE of the said [*trustees of term*], their executors, administrators, and assigns, for a term of 500 years, to commence from the death of the survivor of them the said [*father*] and [*son*], without impeachment of waste, upon the trusts, and with and subject to the powers and provisions hereinafter declared concerning the same; AND from and after the determination of the same term, and in the meantime subject thereto, and to the trusts thereof, To THE USE of the first and every other son of the said [*son*] successively in remainder, one after the other according to their respective seniorities, and the heirs male of their respective bodies; And in default of such issue, TO THE USE of the [*second son*] and his assigns during his life without impeachment of waste; And from and after the decease of the said [*second son*], TO THE USE of the first and every other son of the said [*second son*] successively in remainder, one after the other according to their respective seniorities and the heirs male of their respective bodies; And in default of such issue, TO THE USE of the [*third son*] and his assigns for his life without impeachment of waste; And from and after the decease of the said [*third son*], to the use of the first and every other son of the said [*third son*] successively in remainder, one after the other

Remainder to use of trustees for 500 years.

Limitation of further uses in strict settlement.

(*r*) In the present case the original rentcharge is destroyed, in order to let in the limitations prior to the life estate limited to the father by this settlement; where this is not done, and it is intended to increase his widow's jointure, the following limitation should be substituted for that in the text:—

Limitation of additional rentcharge to father's wife.

"To THE USE that if the said [*mother*] shall survive the said [*father*], the said [*mother*] and her assigns shall thenceforth receive the yearly rentcharge of 300*l.*, to be in addition to the said rentcharge of 500*l.* charged in her favour by the said indenture of the —— day of ——, 18—, to be in full of her jointure," &c., *as in the text, or as the case may require.*

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

according to their respective seniorities, and the heirs male of their respective bodies; And in default of such issue to the use of the first and every other son of the said [*eldest son*] successively in remainder, one after the other according to their respective seniorities, and the heirs of their respective bodies; And in default of such issue to the use of the first and every other daughter of the said [*eldest son*] successively in remainder, one after the other according to their respective seniorities, and the heirs of their respective bodies; And in default of such issue, TO THE USE, &c. [*limitations to the first and other sons of second son in tail, remainder to the first and other daughters of second son in tail, remainder to the first and other sons of third son in tail, remainder to the first and other daughters of third son in tail*]; And in default of such issue, TO THE USE of the fourth and every after born son of the said [*father*] successively in remainder one after the other, according to their respective seniorities, and the heirs male of their respective bodies; And in default of such issue, TO THE USE of the fourth and every after born son of the said [*father*] successively in remainder, one after the other, according to their respective seniorities, and the heirs of their respective bodies; And in default of such issue TO THE USE of the said [*daughter*] and her assigns during her life without impeachment of waste; And from and after her decease TO THE USE, &c. [*limitations to first and other sons of daughter in tail male and in tail, remainder to her first and other daughters in tail*]; And in default of such issue to the use of the second and every other subsequently born daughter of the said [*father*] successively in remainder, one after the other according to their respective seniorities, and the heirs of their respective bodies; And in default of such issue, TO THE USE of the said [*eldest son*] his heirs and assigns for ever: *Trusts of portions term, ut ante*, p. 724; *Power for the son*, "if he shall marry during the life and with the consent of the said [*father*]", *to charge the estates with a jointure rentcharge to the extent of £—— ut ante*, p. 726, *mutatis mutandis* (*s*); PROVIDED ALWAYS, and it is hereby agreed and declared that it shall be lawful for each of them the said [*second son*] and [*third son*] either before or

Power for eldest son to jointure.

Power for other sons to jointure.

(*s*) If a jointure rentcharge is limited to a future wife of the eldest son by this settlement (see *ante*, pp. 716, 740), this power will be omitted.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

after he shall become tenant for life in possession of the freehold hereditaments hereby settled, &c. [*continue power for tenants for life to jointure, ut ante*, p. 726, *mutatis mutandis*]: PROVIDED ALWAYS, and it is hereby agreed and declared that it shall be lawful for the said [*daughter*] (*t*), either before or after she shall become tenant for life in possession, or entitled to the rents and profits of the freehold hereditaments hereby settled, and either after or before marriage (but subject to the uses and estates preceding her estate (*u*), and to the powers annexed to such preceding uses or estates, and to the uses and estates limited in exercise of such powers, by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil), to appoint to any husband whom she may have married, or may subsequently marry, for his life or for any less period, any yearly rentcharge, or yearly rentcharges, not exceeding for any such husband £—— in the whole by the year, free from all deductions except succession duty, to commence from or at any time after her death, and to be charged upon and issuing out of all or any of the freehold hereditaments hereby settled, and to be paid at such times and in such manner as she (*w*) shall direct; Provided nevertheless, that no rentcharge which may be appointed under any of the powers of jointuring hereinbefore contained, or under the power of charging rentcharges lastly hereinbefore contained (other than, and except any rentcharge appointed by the said [*eldest son*] under his aforesaid power of jointuring), shall actually become a charge upon the hereditaments expressed to be charged therewith, &c. [*unless person charging it or some issue becomes entitled in possession, ut ante*, p. 727; *Estates not to be charged with more than a fixed sum yearly for jointures, ut ante*, p. 727]: PROVIDED ALWAYS, and it is hereby agreed and declared that it shall be lawful for every person hereby made tenant for life other than the said [*father*] and [*son*] respectively, either before or after, &c.

Power for female tenant for life to create rentcharge for husband surviving her.

Power for tenants for life to charge portions.

(*t*) If there are several female tenants for life, say :—

"PROVIDED, &c., that it shall be lawful for every female person hereby made tenant for life either before or after."

(*u*) If there are several female tenants for life, say :—

"But subject to the uses and estates preceding the estate of the person for the time being exercising this power," &c.

(*w*) If there are several female tenants for life, say :—

"As the person for the time being exercising this power shall direct."

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

[*continue powers for tenants for life to charge portions for their younger children; portions, except those charged by the eldest son, not to become an actual charge unless the person charging them or some issue becomes entitled to the estates as tenant for life in possession, ut ante*, p. 728, *mutatis mutandis: Proviso that estates shall not be charged with more than a fixed sum for portions, ut ante*, p. 728]: PROVIDED ALWAYS, and it is hereby agreed and declared that if and so long as any person who would but for the provisions contained in sect. 42 of the Conveyancing and Law of Property Act, 1881, be beneficially entitled in possession to the hereditaments hereby settled shall be an infant, and, being a woman, also unmarried, the said [*trustees of settlement*] and the survivor of them, and the executors or administrators of such survivor, or their or his assigns, or other the general trustees or trustee for the time being of these presents (who are hereinafter called "the said trustees or trustee of this settlement"), may at their or his discretion at any time during such minority or minority and discoverture as aforesaid (as the case may be) apply any part of accumulations of income made by them or him pursuant to the provisions of that section in such manner for the permanent improvement of the property as they or he shall in their uncontrolled discretion think fit; and subject thereto shall stand possessed of such accumulations, upon the trusts declared and contained in the same section: PROVIDED ALWAYS, and it is hereby agreed and declared that notwithstanding, &c. [*Insert any clauses which may be thought advisable extending the powers of tenants for life under the Settled Land Acts, ut ante*, pp. 705, *et seq.; adding after the clause that mining rents are not to be capitalised, the following clause:*—"FOURTHLY, any mining lease may be made of any of the freehold hereditaments hereby settled in consideration either of such rent as is mentioned in sub-section 2 of section 4 of the Settled Land Act, 1882, or in consideration of the rents and royalties following, that is to say, at the best surface rent (if any) that can reasonably be obtained, regard being had generally to the circumstances of the case, and in consideration of mining rents and royalties varying according to the market price of the coals, coke, and other minerals raised or gotten out of the mines demised in such lease; And further, it shall be lawful for the person or persons for the time being entitled to exercise the statutory powers of granting mining leases, as hereby enlarged or extended, from time to time by

Power for trustees to apply accumulations of income made during minorities for improvement of the property.

Extension of powers under the Settled Land Acts.

Power to grant mining leases at rents varying with the market price of minerals.

Power to extend terms of mining leases without surrender, and to modify such leases.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

any deed or deeds to make, enter into, and accept any arrangement for extending the term granted by any such lease without surrender thereof (*x*), and at and subject to either the rents and royalties originally reserved by such lease, or such other rents and royalties as may be agreed upon conformably to these presents, or any new covenants, stipulations, or provisions in relation to any collieries, mines, minerals, quarries, or substances leased as aforesaid, or any lands, hereditaments, easements, liberties, licences, powers, authorities, or privileges connected therewith, to, with, and from any person or persons or company for the time being entitled to the benefit of any lease which shall have been made of such collieries, mines, minerals, quarries, or substances, by virtue of such powers to grant mining leases, by way of addition to, or explanation of, or alteration of all or any of the covenants, stipulations, or provisions in any such lease contained, but so nevertheless that no such extended term as aforesaid shall be granted for a further term of more than —— years, to commence from the time when the term originally granted by such lease would have expired but for such extension, and so that any such lease, when so added to, explained, or altered, shall be conformable to the requirements of the statutory powers as hereby enlarged or extended, and so that the lessee or lessees execute a counterpart of every deed to be executed in pursuance of this provision": *Also extend the powers of application of capital moneys* (*see ante, p.* 707), *so as to render them applicable*, "in or towards payment of any costs, charges, and expenses of carrying on, working, conducting, and managing any collieries, mines, quarries, or businesses in or upon the freehold hereditaments hereby settled under the power in that behalf hereinafter contained, but only if and so far as the profits of the said collieries, mines, quarries, and businesses shall be insufficient for such payments, or in any of the modes, or for any of the purposes in or for which the reserve fund hereinafter mentioned is made applicable under the trusts and provisions in that behalf hereinafter contained, but only in aid of such reserve fund and so far as the same shall be

(*x*) An existing lease having a term of more than twelve months unexpired, must be surrendered before an extension of the term can be granted under the statutory powers: see *Re Farnell*, 33 Ch. D. 599.

insufficient for any such purpose as aforesaid": *Also give power to raise money on mortgage* (*see p.* 707)," for the payment of any costs," &c., *ut supra: Or, if there is not intended to be any reserve fund, the clause extending the application of capital moneys should enumerate the purposes to which such moneys are to be applicable, and the power to raise money should either enumerate such purposes, or authorise them by reference to the foregoing extension clause*]: PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the said [*father*], and for every person for the time being entitled as tenant for life, or in tail male, or in tail under the limitations hereinbefore contained, to the possession or to the receipt of the rents and profits of the freehold hereditaments hereby settled, for his or her own benefit, and, during the minority of any such person, for the trustees or trustee of this settlement for the benefit of such minor, to carry on, work, conduct, and manage all collieries, mines, and quarries which are now so being worked by the said [*father*] as aforesaid, and any collieries, mines, or quarries the leases whereof respectively may from time to time expire or determine, and all businesses relating thereto respectively, and may sell or dispose of all coal, coke, minerals, and substances raised or gotten from any such collieries, mines or quarries in such manner in all respects as he or they shall think proper or expedient, and as if he or they were the absolute owner or owners thereof, until such collieries, mines or quarries respectively shall be exhausted or worked out, subject, nevertheless, as hereinafter provided, with full power for the purpose of carrying on the business of any such collieries, mines or quarries, to employ such persons with such salaries or wages as he, she, or they shall think proper, and to enter into such contracts and engagements respecting such business as he or they shall think reasonable, and to adjust and settle all accounts existing or future, and transactions relating thereto, subject, nevertheless, as is hereinafter provided; And it is hereby agreed that the charges and expenses of carrying on, working, conducting and managing such collieries, mines, quarries, and businesses as aforesaid, shall be borne and defrayed in the first instance out of the profits thereof, and, if they shall be insufficient, shall be chargeable upon the freehold hereditaments hereby settled, and the rents and profits thereof; PROVIDED, never-

Power for tenants for life to work mines.

Mines to be properly worked.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

theless, that the said [*father*] and other the person or persons for the time being working any, all, or any such collieries, mines, and quarries as aforesaid, shall in the working of the same respectively observe and keep true levels and in all things work the same in a fair, honest, and good workmanlike manner, and as other works of the like nature are usually and ought to be worked; PROVIDED ALSO that the said [*father*] and other the person or persons for the time being working all or any of the said collieries, mines, and quarries under the power in that behalf hereinbefore contained, shall keep or cause to be kept regular, just, correct, and particular accounts of the quantities of coal, coke, minerals, and substances which shall from time to time be raised from or out of the same premises respectively, and of the losses and expenses therefor from the usual amount of taking such accounts, and shall from time to time permit the said trustees or trustee of this settlement, and their or his agents, at all reasonable times to inspect the said accounts and to make copies thereof or extracts therefrom; And it is hereby further agreed that all such accounts shall be audited and settled once in every six calendar months by a competent accountant or accountants to be appointed by the said trustees or trustee of this settlement, and such accountant or accountants shall be paid out of the profits of the said collieries, mines, and quarries, or out of the rents and profits of the freehold hereditaments hereby settled, such salary or salaries as the said trustees or trustee of this settlement shall think reasonable, and the said trustees or trustee of this settlement shall have full power to apportion the amount of such salary or salaries, or compensation to be borne by the profits of each such colliery, mine, or quarry as they or he shall think proper: PROVIDED ALSO that upon the taking and auditing of the accounts of every such colliery, mine or quarry as aforesaid, the said [*father*] and the person or persons for the time being working the same under the power hereinbefore contained shall, within one month of the auditing and settling of every such account pay to the said trustees or trustee of this settlement, or (being the said trustees or trustee of this settlement) shall set apart one —th part or share of the net profits which shall have been made during the immediately preceding half year from or out of the colliery, mine, or quarry, to which such account shall relate, and on the footing of such account, to form such reserve fund

Accounts to be kept.

Accounts to be audited half-yearly.

Reserve fund to be formed.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

as is hereinafter mentioned; and it is hereby agreed that the said trustees or trustee of this settlement shall hold all moneys which shall be received or set apart by them or him under this present provision, and shall, with the consent of the said [*father*] or other the person (if any) for the time being paying such moneys, and if there shall be no such person, at the discretion of such trustees or trustee, invest the same in or upon any stocks, funds, or securities in or upon which capital moneys arising under the Settled Land Act, 1882, or any other Act for the time being in force relating to settled lands, may be invested, with power with the like consent or at the like discretion to vary such investments, and shall hold and apply such fund with the like consent or with the like discretion as aforesaid, upon and for all or any of the trusts and purposes following, that is to say, upon trust from time to time out of the income of such reserve fund, or (if the same shall be insufficient), then out of the capital of the same fund from time to time to renew and replace any plant, machinery, implements or utensils which may from time to time have become or been worn out, damaged, lost, obsolete, or otherwise unsuitable, or to provide any new or additional plant, machinery, implements or utensils which may be necessary or expedient for the more effectual or profitable working of the same collieries, mines, or quarries, or any of them, or to contribute towards any general pumping scheme or schemes of any district in which such collieries, mines, and quarries respectively are situate, or to provide for the payment of any damages which may be given or assessed in any action, or which may become payable under or by virtue of any award, or compromise of any action, or otherwise, to, or in favour of the owner or owners, or lessee or lessees of any adjacent or neighbouring colliery, mine, or quarry, for or by reason of any injury, damage, or loss occasioned by the flooding of the same, or subsidence of surface, or otherwise, and which may be attributable, or alleged to be attributable, to some neglect, or default or defect in relation to any colliery, mine, or quarry so for the time being worked by the said [*father*] or any other person under the power in that behalf hereinbefore contained [*add any other purposes to which the reserve fund is intended to be applicable*]: And, subject to the trusts aforesaid, the said trustees or trustee of this settlement shall hold, pay and apply the capital and income of the said

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

reserve fund and the income thereof to the like uses upon such trusts and with and subject to such powers, provisions, and declarations as shall as nearly correspond with the uses, trusts, powers, provisions and declarations herein limited, declared and contained concerning the freehold hereditaments hereby settled, and the rents and profits thereof respectively as the nature of the property will permit, but so as not to multiply charges and powers of charging, and so that no person hereby made tenant in tail male or in tail by purchase shall become absolutely entitled to the capital of the said reserve fund unless and until he or she shall attain the age of twenty-one years, but the same shall, on his or her death under that age, devolve in the same manner as if the same had been freeholds of inheritance, part of the said hereditaments and premises hereby settled; PROVIDED ALSO, that it shall be lawful for the said [*father*] and every person for the time being working any such colliery, mine, or quarry under the power in that behalf hereinbefore contained, at any time, if he shall find it disadvantageous or inadvisable to continue to work the same, to give to the said trustees or trustee of this settlement notice in writing of his intention absolutely to close and discontinue the same and all accounts and transactions relating thereto, and upon the expiration of six calendar months after the giving of such notice to carry such intention into effect accordingly; PROVIDED ALWAYS, and it is hereby agreed and declared, that as between the said [*father*], his executors and administrators, and the hereditaments particularly described in the third schedule hereunder written, the same hereditaments shall be primarily liable for the repayment of the principal moneys and interest charged thereon respectively by the several mortgages mentioned in the same schedule, and that in the event of the said [*father*], his executors or administrators, being called upon by any mortgagee or mortgagees to pay the said principal moneys and interest, or any part thereof respectively, he or they shall be entitled to be recouped and to recover any sum or sums which he or they may so pay from or out of the hereditaments comprised in the mortgage or respective mortgages whereby such sum or sums is or are secured, and that the sum or sums so paid by the said [*father*], his executors or administrators, shall until repayment thereof to him or them, be charged with the pay-

Power for tenants for life to discontinue working mines.

Proviso that hereditaments in the third schedule shall be primarily liable for the mortgages charged thereon.

ment to him or them of such sum or sums, with interest thereon at the rate mentioned in the mortgage or mortgages in respect of which such sum or sums shall have been paid by the said [*father*], his executors or administrators: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreements, and for the considerations aforesaid, the said [*father*] and [*son*] do and each of them doth hereby, according to their respective estates and interests, assign, and as settlors convey unto the said [*trustees of settlement*], ALL AND SINGULAR the messuages and pieces or parcels of land particularly described in the second part of the first schedule hereunder written, TO HOLD the same premises UNTO the said [*trustees of settlement*], their executors, administrators, and assigns, for the residues of the several terms therein respectively created, which in the same part of the said first schedule are respectively set opposite to the properties to which the same respectively relate, subject to the several rents and covenants on the part of the several lessees, and to the conditions reserved by and contained in the said leases respectively, UPON TRUST that the said trustees or trustee of this settlement shall by and out of the rents and profits of the said several leasehold premises pay the rents, and perform and observe the covenants on the part of the several lessees, and conditions reserved by and contained in the said leases respectively, and subject thereto shall hold the same premises upon such trusts, and with and subject to such powers, provisions, and declarations as shall as nearly correspond with the uses, trusts, powers, provisions, and declarations hereinbefore limited, declared, and contained concerning the freehold lands and hereditaments hereby settled as the nature of the property will permit, but so as not to multiply charges or powers of charging, and so that no person hereby made tenant in tail male or in tail by purchase shall become absolutely entitled to the said leasehold premises unless or until he or she shall attain the age of twenty-one years, but the same shall, on his or her death under that age, devolve in the same manner as if the same had been freeholds of inheritance part of the freehold hereditaments hereby settled:

Fourth *testatum.*

Assignment of leaseholds.

Trusts of leaseholds to correspond with uses of freeholds (*y*).

(*y*) If desired, the vesting in this and in the next following *testatum* may be further deferred as in Precedent XXXV., *ante*, p. 697.

XXXVIII. **Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.**

Fifth *testatum.*

AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations aforesaid, the said [*father*] hereby assigns unto the said [*general trustees*], ALL AND SINGULAR the plant, machinery, utensils, implements, and chattels of every description in or upon or employed in the working of the collieries, mines, quarries, minerals, and substances hereby settled, TO HOLD the same unto the said [*general trustees*], their executors, administrators, and assigns, upon the trusts hereinafter declared and contained concerning the same; AND IT IS HEREBY AGREED and declared, that the said trustees or trustee of this settlement shall hold the plant, machinery, utensils, implements, and chattels hereby assigned, or which may hereafter be added to, or substituted for the same or any part thereof, as herein provided, upon such trusts and with and subject to such powers, provisions, and declarations as shall as nearly correspond with the uses, trusts, powers, provisions, and declarations herein limited, declared, and contained, concerning the freehold lands and hereditaments hereby settled as the nature of the property will permit, but so as not to multiply charges or powers of charging, and so that no person hereby made tenant in tail male or in tail by purchase shall become absolutely entitled to the same premises, unless and until he or she shall attain the age of twenty-one years, but, on his or her death under that age, the same premises shall devolve in the same manner as if the same had been freeholds of inheritance part of the lands and hereditaments hereby settled; PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee of this settlement shall allow the said [*father*], and every person hereby made tenant for life, who shall be entitled to the possession or the receipt of the rents and profits of the said lands and hereditaments hereby settled, during his or her life, to continue in, or take and keep possession of the said plant, machinery, implements, utensils, and chattels hereby assigned, or which may hereafter be added to or substituted for the same or any part thereof, as herein provided, and to alter, vary, remove, sell, and dispose of the said plant, machinery, utensils, implements, and chattels, or any of them; PROVIDED NEVERTHELESS that the said plant, machinery, utensils, implements, and chattels shall be employed only in working the collieries, mines, quarries, and minerals

Assignment of mining plant.

Trusts of mining plant to correspond with uses of freeholds.

Power for successive tenants for life to use plant in settled mines.

Power for trustees to resume possession of

hereby settled, and that the said [*father*] or other person so continuing or taking and keeping possession thereof as aforesaid shall maintain the same in good and proper repair and condition and efficient working order, and upon his default or neglect in this respect, or if he shall in any respect, in the uncontrolled judgment of the said trustees or trustee of this settlement, fail or neglect to deal with the same plant and premises in due course of management or for any purpose not hereby authorized, or otherwise deal with the same improperly, then it shall be lawful but not obligatory on the said trustees or trustee of this settlement to take and keep possession of the said plant, machinery, utensils, implements, and chattels, or any of them, and in their or his absolute discretion either to sell and dispose of the same, or to allow the said [*father*] or such other person as aforesaid to continue in possession of and to use the same with and subject to such restrictions and conditions and in such manner only as the said trustees or trustee of this settlement shall think proper; And it is hereby further declared that any sale under the provisions in that behalf hereinbefore contained of the said plant, machinery, utensils, implements, and chattels, or any of them, may be made to the lessee or lessees of any colliery, mine, or quarry which may be leased under or by virtue of these presents, and that the proceeds of any sale or sales of any such last mentioned premises shall be receivable by the said trustees or trustee for the time being of this settlement to be held and applied by them as if the same purchase monies were proceeds of sale of part of the said lands and hereditaments hereby settled; but so, nevertheless, that it shall be lawful for the said trustees or trustee of this settlement in their or his absolute discretion from time to time to grant either generally or in any particular instance to the said [*father*] or such other person as aforesaid authority to receive and give effectual receipts for any such proceeds of sale as last aforesaid not exceeding the sum of £—— in respect of any one sale, upon his undertaking to apply such proceeds forthwith in the purchase or construction of new or substitutional plant, machinery, utensils, implements, or chattels in lieu of those sold, and to be subject to the trusts hereinbefore declared concerning the plant and premises hereby assigned: [*Appointment of trustees for purposes of the Settled Land Acts, and*

plant if used improperly.

Proviso as to proceeds of sales of plant.

XXXVIII. Family Resettlement and Settlement of Freeholds and Leaseholds comprising Mining Property and Plant, &c.

of the Conveyancing, &c., Act, sect. 42, *ante,* p. 698; *power to appoint new trustees of term, and new trustees of settlement, ante,* p. 730; *trustee clauses, ante,* p. 552].

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

Part 1 (*Freeholds*).

Part 2 (*Leaseholds*).

THE SECOND SCHEDULE ABOVE REFERRED TO.

THE THIRD SCHEDULE ABOVE REFERRED TO.

XXXIX. *FAMILY RESETTLEMENT by* FATHER *and only* SON *of* FREEHOLD HEREDITAMENTS *comprising an* ADVOWSON, SUBJECT *in common with other Hereditaments (the absolute property of the Father) to* ANNUITIES *and* INCUMBRANCES. LIMITATION *of* HEREDITAMENTS, *other than Advowson, to the* FATHER *and* SON *successively for their* LIVES, *with* REMAINDER *to the* MALE ISSUE *of the* SON *as he shall* APPOINT, *and in Default of appointment, to his* SONS *successively in* TAIL, *with ultimate* REMAINDER *to the* SON *in* FEE SIMPLE; LIMITATION *of* ADVOWSON *to such* USES *as* FATHER *and* SON *shall* JOINTLY APPOINT, *and subject thereto, to* TRUSTEES *upon* TRUST *to* PRESENT NOMINEE *of Son, and to* SELL, *and to hold* PROCEEDS *of* SALE *upon* TRUST *to* REINVEST *in* LAND *to be held upon the* USES *limited of the other* SETTLED HEREDITAMENTS. APPORTIONMENT *of* ANNUITIES *and* INCUMBRANCES *between the Settled and other Hereditaments charged therewith.*

THIS INDENTURE (*z*) made the —— day of ——, 18—,

Parties. BETWEEN [*father*], of, &c., of the first part; [*son*], of, &c., of the second part; [*trustee of settlement*], of, &c., and [*trustee of*

(*z*) Stamp, 20*s.*

XXXIX. **Family Resettlement of Estates comprising Advowson.**

settlement], of, &c., of the third part: WHEREAS under or by virtue of an indenture made the —— day of ——, 18—, Between [*parties*], (being the settlement made in contemplation of the then intended marriage which was shortly afterwards duly solemnized between the said [*father*] and [*mother*], and under or by virtue of an indenture made the —— day of ——, 18—, between [*parties*], and duly enrolled as a disentailing assurance, the freehold lands and hereditaments described in the first schedule hereunder written, and hereinafter expressed to be hereby granted, including the advowson or perpetual right of presentation hereinafter mentioned now stand limited, subject nevertheless, in common with the hereditaments specified in the second schedule hereunder written (of or to which the said [*father*] is possessed or entitled in fee simple) to the several annuities and mortgages specified in the third schedule hereunder written, and also subject to the uses subsisting in the same hereditaments hereby granted, by virtue of the said indenture of settlement, or created by exercise of the powers therein contained, and which preceded the estate in tail male thereby limited to the said [*son*], other than the use thereby limited to the said [*father*], and to the powers annexed to such preceding uses and estates, to such uses, and upon, with, and subject to such trusts, powers, and provisions as the said [*father*] and [*son*], shall by deed appoint, and in default of such appointment, and so far as no such appointment shall extend, to the uses, and upon, with, and subject to the trusts, powers, and provisions to, upon, with, and subject to which the same hereditaments would have stood limited if the said disentailing assurance had not been executed: AND WHEREAS the said [*son*] is the only child of the marriage, between the said [*father*] and [*mother*], and attained the age of twenty-one years on the —— day of ——, last past; AND WHEREAS all the hereditaments and premises hereinafter expressed to be hereby granted, are under or by virtue of the said indenture of settlement subject to a yearly rentcharge of £——, by way of jointure, which will become payable to [*mother*], the wife of the said [*father*], in case she shall survive the said [*father*], and to powers of distress and entry, and to a term

Short recital of title under former settlement and disentailing deed (*a*).

of state of family;

that lands, &c., to be resettled are subject to jointure, &c.;

(*a*) For fuller recitals of such title, see *ante*, Precedents XXXVII., XXXVIII., pp. 712, 731.

XXXIX. Family Resettlement of Estates comprising Advowson.

of 99 years for securing the same jointure rentcharge, and are also, under or by virtue of the same indenture, subject to, and charged with such sum not exceeding the sum of £——, as may in the events which shall happen become raisable for the portions or advancement of the younger children or child (if any), of the said [*father*] by the said [*mother*], and to and with such yearly sums as may become raisable by way of interest on the said portions for the maintenance and education of such younger children or child, and to a term of 600 years by the same indenture of settlement limited to the said [*trustees of that term*], for securing the said sum and interest so respectively raisable under the same term as aforesaid;

of agreement for resettlement, and apportionment of incumbrances.

AND WHEREAS the said [*father*] and [*son*], after full consultation and consideration of their respective interests in the premises, and other circumstances, have agreed (*b*) that the said advowson, and all other the messuages, lands, and hereditaments hereby granted, and all other, if any, the hereditaments which are now subject to the joint power of appointment contained in the said disentailing assurance, shall be respectively settled in manner hereinafter appearing, and it has been agreed that these presents shall contain the power or provision for the apportionment of annuities, mortgages, and incumbrances affecting the hereditaments hereby granted in common with such other hereditaments as aforesaid as is hereinafter expressed and contained: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and for the purpose of perpetuating the enjoyment in the family of the hereditaments and premises hereby appointed, and for divers other good purposes and considerations, the said [*father*] and [*son*] hereby, in exercise of the joint power vested in them by virtue of the said disentailing assurance, and of every other power them hereunto enabling, as settlors appoint that ALL THAT the advowson or perpetual right of patronage and presentation of and to the rectory and parish church of ——, in the said county of ——, of which the Rev. —— is the present rector, AND ALL THOSE [*describe parcels by reference to first schedule*], and all other hereditaments (if any) which are subject to the said joint power of appointment contained in the said disentailing

Testatum.

Appointment of hereditaments to be settled.

(*b*) See as to this, *ante*, p. 715, note (*d*).

XXXIX. Family Resettlement of Estates comprising Advowson.

assurance, shall, subject nevertheless in common with the hereditaments specified in the said second schedule hereunder written, to the several annuities charged thereon by the will of [*testator*], of, &c., deceased, and to the several indentures of mortgage specified in the said third schedule hereunder written, and to the principal moneys and interest secured by such indentures respectively, and also subject to the uses subsisting in the same hereditaments hereby granted by virtue of the said indenture of settlement, or created by exercise of the powers therein contained, and which preceded the estate in tail male thereby limited to the said [*son*], other than the use thereby limited to the said [*father*], and to the powers annexed to such preceding uses or estates, remain and be [And they the said [*father*] and [*son*] as settlors convey the same premises (*c*)] TO THE USES, upon the trusts, and with and subject to the powers and provisions hereinafter limited, declared, and contained concerning the same premises respectively, that is to say, AS TO all the said hereditaments and premises hereby appointed other than the said advowson, TO THE USE of the said [*father*] and his assigns during his life, without impeachment of waste in restoration and continuation of the former life estate limited to the said [*father*] by the said indenture of settlement of the —— day of ——, 18—, with all powers of appointment, leasing, consenting to sales and exchanges, and all other powers limited to the said [*father*] by the same indenture; And from and after the death of the said [*father*], TO THE USE of the said [*son*] and his assigns during his life, without impeachment of waste; And from and after the death of the said [*son*], TO THE USE of, or in trust for all, or such one or more exclusively of the others or other of the sons, or of the issue male of any son or sons of the said [*son*], for such estate or estates in tail male, or any lesser estate or estates, and charged with such annual sum or sums in favour of any one or more of such sons or issue male, and subject to such

Declaration of uses:

as to hereditaments, except advowson;

to use of father for life;

remainder to son for life;

remainder to issue male as son shall appoint;

(*c*) If these words in brackets are inserted (which appears to be the more technically accurate form of expression), the words "as settlors" will be omitted from the appointment at the commencement of the testatum; there can, however, be no doubt that the expression "as settlors appoint" will import into the deed the statutory covenant for further assurance.

XXXIX. Family Resettlement of Estates comprising Advowson.

provisions, limitations, restrictions, and remainders over for the benefit of all or any one or more of such sons or issue male in tail male, or for any lesser estate or estates, as the said [*son*] shall by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil from time to time appoint; And in default of and until any such appointment, and so far as any such appointment shall not extend, To THE USE of the first and other sons of the said [*son*] successively according to their respective seniorities in tail male, with remainder To THE USE of the said [*son*], his heirs and assigns; AND AS TO the said advowson To SUCH USES, upon such trusts, and with and subject to such powers, provisoes, and declarations, as the said [*father*] and [*son*] shall, during their joint lives, by any deed or deeds, with or without power of revocation and new appointment, jointly appoint, And in default of and until any such appointment, and subject to any previous exercise of such joint power as aforesaid, if and so far as the same shall have been previously exercised, but in defeasance (but only so far as may be necessary for the present purpose) of the exercise of such power so far as it shall not have been exercised, To THE USE of the said [*trustees*], their heirs and assigns, UPON TRUST that on the occasion of any avoidance of the said rectory and parish church during the joint lives of the said [*father*] and [*son*] and the life of the survivor of them, and during the period of twenty-one years from the death of such survivor, they the said [*trustees*], or the survivors of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called "the said trustees or trustee") shall present to the said rectory and parish church such son of the said [*son*], other than an eldest or only son for the time being, and, failing such son, such husband of any daughter of the said [*son*] as, being desirous and ready for presentation, he the said [*son*] shall nominate for that purpose, and after the death of the said [*son*] as they the said trustees or trustee shall during the said period of twenty-one years think fit; AND UPON FURTHER TRUST that the said trustees or trustee shall, with the consent of the said [*father*] and [*son*], during their joint lives,

in default of appointment, to his first and other sons successively in tail; remainder to son in fee;

as to advowson, to such uses as father and son shall jointly appoint (*d*).

subject to such appointment, to use of trustees upon trust to present nominee of son.

(*d*) As to the advisability of inserting such joint powers of appointment, see *ante*, p. 716, note (*e*).

XXXIX. Family Resettlement of Estates comprising Advowson.

and of the survivor of them during his life, and after the death of such survivor at the discretion of the said trustees or trustee, but, during the said period of twenty-one years, only after making such presentation as aforesaid or after all the sons other than the eldest or only son for the time being of the said [*son*] shall have attained the age of twenty-one years, and they, and all the husbands of any then married daughter of the said [*son*], shall have in writing declined such presentation, sell the said advowson, And shall from and after such sale stand possessed of the net monies arising therefrom after payment thereout of the costs and expenses of and incident to the same, or otherwise incurred in respect of the premises: UPON THE TRUSTS, and with and subject to the powers and provisions hereinafter declared concerning the same, that is to say, UPON TRUST TO invest the said net monies in the purchase of any freehold, copyhold or customary messuages, lands, tenements, or hereditements of inheritance in England or Wales, with power to purchase, subject to any special stipulations, and to complete or accept any contract or title, though not strictly enforceable or marketable, and to waive any objections or requisitions, And to cause the same when so purchased to be conveyed and assured respectively, according to the nature and quality thereof respectively: TO THE USES, upon the trusts, and with and subject to the powers and provisions hereinbefore limited and declared concerning the hereditaments other than the said adowson hereby appointed, And to hold the said monies until the same shall have been invested in the purchase of such hereditaments as aforesaid upon trust to invest the same in or upon [*Add investment clause, ut ante*, pp. 545, 554, 558 *or* 562], And upon trust to pay and apply the income arising from such investments in the same manner as the rents and profits of the hereditaments hereby appointed are for the time being payable or applicable under or by virtue of these presents: PROVIDED ALWAYS that upon any sale of the said advowson under the trust for sale thereof hereinbefore contained, no purchaser shall be bound or concerned to inquire whether any person shall then be desirous of, or ready for presentation to the said rectory or parish church, or shall have declined such presentation as aforesaid: [*Insert such powers and provisions with regard to management of or dealing with the settled property as may be thought*

Protection of purchasers.

XXXIX. **Family Resettlement of Estates comprising Advowson.**

Proviso that as between persons entitled to settled hereditaments and persons entitled to certain other hereditaments, the settled hereditaments shall be charged with certain proportions of incumbrances affecting both sets of hereditaments:

advisable from the preceding Precedents]: PROVIDED ALWAYS, and it is hereby further declared and agreed by and between the said parties to these presents, that, as between the persons who for the time being shall be seised of, or entitled to the hereditaments comprised in the said first schedule hereunder written, under and by virtue of the uses, limitations, or trusts by these presents declared and contained of and concerning the same, and the same hereditaments, and the said [*father*], his heirs, executors, administrators, and assigns, and other the person or persons for the time being seised of, or entitled to the hereditaments specified in the said second schedule hereunder written, and such last mentioned hereditaments, the said hereditaments and premises comprised in the said first schedule hereunder written, shall in respect of the said several mortgages and incumbrances affecting the same hereditaments (which charges and incumbrances are specified in the said third schedule hereunder written), be liable to and charged with the respective parts, shares, and proportions thereof only which are hereinafter mentioned, that is to say: As to and concerning the annuity mentioned in the said third schedule of £——, payable to [*annuitant*] for her life, with the annual sum of £——, part thereof during her life; As to, and concerning the said annuity of £——, also mentioned in the same schedule, and payable to [*other annuitant*] for her life in the event mentioned in the same schedule, with the annual sum of £—— part thereof from the time when the same shall arise, And as to and concerning the principal sums of £—— and £——, making together the sum of £——, which stand charged upon the said hereditaments and secured by the indentures of mortgage and further charge respectively dated the —— day of ——, 18—, and the —— day of ——, 18—, respectively mentioned in the same schedule, with the sum of £——, part of such total sum of £——, and the interest in respect of the said sum of £——, only at the rate of 4 per cent. per annum henceforth to accrue due thereon, As to and concerning the principal sum of £——, which stands charged upon the said hereditaments and secured by the indenture of mortgage of the —— day of ——, 18—, mentioned in the same schedule with the sum of £——, part thereof and the interest in respect of the said sum of £—— only, at the rate of 4½ per cent. per annum, hence-

XXXIX. Family Resettlement of Estates comprising Advowson.

forth to accrue due: And that the hereditaments specified in the said second schedule hereunder written shall be subject to and charged and chargeable with the residue of the said several annuities of £——, £——, and with the residue of the said principal sums of £——, and £—— respectively, and interest at the rates aforesaid; And it is hereby further agreed and declared by and between the said parties to these presents that any interest of mortgage or capital sums and any annuities or other annual charges which are or may become chargeable in the hereditaments and premises hereby settled, or any of them, or any part or parts thereof under and by virtue of the provisions and declarations of apportionment hereinbefore contained, and which may accrue during the time that any person or persons who may become tenant for life in possession under and by virtue of these presents shall be in the actual possession of or entitled to the rents and profits of the said hereditaments and premises hereby settled, and which shall or may be in arrear and unpaid or unsatisfied at the time or respective times of the death of such person or persons shall be and constitute a debt or debts to the amount of such arrears from the heirs, executors, and administrators, and from the real and personal estates of such person or persons to the intent and so as to indemnify and save harmless not only the estate of the person next in remainder, but also the hereditaments and premises settled of and from such arrears: [*Appointment of trustees for the purposes of the Settled Land Acts, and of the Conveyancing, &c., Act*, 1881, *sect.* 42, *ante*, p. 698; *power to appoint new trustees, ante*, p. 730 (*omitting the first clause relating to the trustees of terms*); *trustee clauses, ante*, p. 552.]

And that the other hereditaments shall be charged with residue of such incumbrances.

Declaration that interest of mortgages, &c., charged shall be debt due from the estate of the tenant for life so as to indemnify remainderman.

In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

The Third Schedule above referred to.

XL. *SETTLEMENT on* MARRIAGE *by a* TENANT FOR LIFE *in* POSSESSION *of* ESTATES *settled in* STRICT SETTLEMENT, CHARGING HIS LIFE ESTATE *with* PIN MONEY *in favour of the intended* WIFE, *and exercising his power of* CHARGING *a* JOINTURE *for her, and* PORTIONS *for younger Children.* POWER *for* HUSBAND *to admit the* CHILDREN *of a* SUBSEQUENT MARRIAGE *to* SHARE *in the Sum provided for* PORTIONS.

Parties.

THIS INDENTURE, (*e*) made the —— day of ——, 18—, BETWEEN [*intended husband*] of, &c., of the first part; [*intended wife*] of, &c., of the second part; And [*trustee of terms*], of, &c., and [*trustee of terms*] of, &c., of the third part: WHEREAS [*recite intended marriage, ante*, p. 699]: AND WHEREAS under or by virtue of an indenture of settlement dated, &c., and made, &c., [*or* "the will of [*testator*], late of —— deceased, dated, &c., and proved," &c.,] the several manors, messuages, lands, and hereditaments, situate at —— in the county of —— and therein particularly described, were, subject as therein is mentioned, limited to the use of the said [*husband*] for his life [*or, if the husband was not the first tenant for life under the settlement,* "to certain uses under which the said [*husband*] is now tenant for life in possession of the same hereditaments"], with divers remainders over; And in the indenture [*or* "will"] now in recital was contained, &c. [*recite fully the powers of jointuring and charging portions*]; AND WHEREAS some of the hereditaments comprised in the said indenture of settlement [or "will"] have been sold under the powers in that behalf therein contained or conferred by statute, and some of the proceeds of sale have been from time to time invested in the purchase of other hereditaments which have been conveyed or assured to the uses and upon the trusts of the same indenture of settlement [*or* "will"], and the remainder of such proceeds of sale have been invested in and are now

Recitals (*f*): of intended marriage; of original settlement; of sales of settled lands;

(*e*) Stamp, 30*s*.

(*f*) If the strict settlement is created by deed this settlement may be expressed to be supplemental thereto, as follows:—

"AND SUPPLEMENTAL to an indenture of settlement dated, &c., and made, &c. (hereinafter called 'the principal indenture')." After this statement the recital of the intended marriage will be inserted.

XL. Marriage Settlement charging Jointure and Portions under Power in strict Settlement.

represented by the several stocks, funds, and securities following, that is to say, [*describe them*] all of which are now standing in the names of [*general trustees*] as the trustees of the settlement created by the same indenture [*or* "will"]: AND WHEREAS upon the treaty for the said marriage it was agreed that the said [*husband*] should make such provision as is hereinafter contained for the said [*wife*] and his younger children by her in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the said intended marriage, the said [*husband*] hereby grants, and as settlor conveys unto the said [*trustees*] and their heirs ALL AND SINGULAR (*g*) the manors, messuages, lands, and hereditaments of freehold tenure now subject to the subsisting uses of the hereinbefore recited indenture of settlement [*or* "will"] TO HOLD the same unto the said [*trustees*] and their heirs during the joint lives (*h*) of the said [*husband*] and [*wife*] To the use that, if the said intended marriage shall be solemnized, the said [*wife*] shall during the now intended coverture receive, &c., [*continue limitation of rentcharge by way of pin money, ante*, p. 689]; And subject and charged as aforesaid, TO THE USE of the said [*husband*] for his life without impeachment of waste: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and in consideration of the said intended marriage, and in exercise of the said power in this behalf vested in him the said [*husband*] by the said indenture of settlement [*or* "will"]: And of every or any other power him hereunto enabling, appoints and grants unto

of agreement for provision of jointure and portions.

First *testatum.*

Grant of freeholds to trustees during joint lives of husband and wife to secure pin money.

Second *testatum.*

Charge of jointure.

(*g*) If only part of the settled hereditaments are to be charged, say:—

"ALL AND SINGULAR the messuages, lands, and hereditaments particularly described in the schedule hereunder written, being part of the said hereditaments and premises subject to the uses of the said indenture of settlement, [*or* 'will,']" &c.

(*h*) Sometimes this provision is effected by means of a bargain and sale and demise of the premises for a nominal consideration to the trustees for a term of ninety-nine years, if the husband and wife shall so long live, followed by a declaration of the trusts of the term. The words "bargain and sell" and the expressed consideration will vest the legal term in the trustees without entry. But this form does not seem to have any advantage over the simpler and more concise form given in the text.

XL. Marriage Settlement charging Jointure and Portions under Power in strict Settlement.

the said [*wife*,] during her life if the said intended marriage shall be solemnized, and who shall survive him the said [*husband*], a yearly rentcharge of £—— by way of jointure to be charged upon and issuing out of all and singular the hereditaments and premises now subject to the uses of the said indenture of settlement [*or* "will"] (*i*) to be considered as accruing from day to day but to be paid to the said [*wife*] by equal half-yearly payments without any deduction [except for succession duty (*k*)] on the —— day of ——, and the —— day of —— in every year, the first half-yearly payment thereof to be made on such of the said days as shall first happen after the death of the said [*husband*] (*l*): AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and in consideration of the said intended marriage, and in exercise, &c., (*ut supra*) the said [*husband*] hereby appoints that all and singular the said hereditaments and premises now subject to the uses of the said indenture of settlement [*or* "will"] shall, subject to the rentcharges of £—— and £—— hereinbefore charged thereon as aforesaid respectively and to all powers and remedies [and to the term hereinbefore created] for securing payment of the same or either of them, be charged with the payment to the younger child or children (if any) of the said intended marriage (that is to say any child or children other than an eldest or other son or sons who, upon his or their respectively attaining the age of twenty-one years, shall become entitled either in possession or remainder under or by virtue of the said indenture of settlement [*or* "will"], to the hereditaments and premises thereby settled for the first estate in tail male) who, being a son or sons, shall attain the

Third *testatum*.

Charge of portions.

(*i*) If only part of the settled hereditaments are to be charged, say :—

"All and singular the said hereditaments and premises hereinbefore granted and charged with the said yearly rentcharge of £——," &c.

(*k*) Succession duty will be payable if the original settlement was created by will : see 51 Vict. c. 8, s. 21 (2), *post*, Vol. VII., p. 272 ; and the duty may be payable if the settlement was created by deed, unless it was a settlement of the husband's own property : see *ante*, p. 717, note (*g*).

(*l*) It is no longer necessary to give express powers of distress and entry for securing the rentcharge : see *ante*, sub tit. "ANNUITIES," Vol. I., p. 671.

XL. Marriage Settlement charging Jointure and Portions under Power in strict Settlement.

age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, of such sum of money as hereinafter mentioned (that is to say) if there shall be but one such younger child (other than as aforesaid) the sum of £——; And if there shall be but two such younger children (other than as aforesaid) the sum of £——; And if there shall be three or more such younger children the sum of £——; the said sum of £—— or £—— or £——, as the event may happen, to be raised by the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor or other the trustees or trustee of these presents (hereinafter called "the said trustees or trustee") after the death of the said [*husband*] or in his lifetime with his consent in writing by such ways and means as are hereinafter mentioned and to be vested in and paid to such child or to all, &c., [*continue provisions for younger children as the husband shall appoint and in default of appointment for them equally at twenty-one or marriage, ante*, p. 691; *hotchpot clause, substituting the words* "And the said [*husband*] hereby further appoints" *for* "And it is hereby agreed" &c., *ut ante*, p. 691]; AND the said [*husband*] further appoints that the said trustees or trustee shall raise, but subject and without prejudice as aforesaid, such yearly sum of money as shall be equal to interest at the rate of 4 per cent. per annum on the expectant portion or portions of the said child or children (other than as aforesaid), clear of all deductions except succession duty, to commence from the death of the said [*husband*] and to be applied by the said trustees or trustee in their or his discretion for the maintenance and education of the child or children of the said intended marriage for whom a portion or portions are intended to be hereby provided: And the said [*husband*] further appoints that the said trustees or trustee shall, &c., [*continue advancement clause, ut ante*, p. 692]: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, and in exercise, &c. [*ut supra*], the said [*husband*] hereby appoints ALL AND SINGULAR the hereditaments and premises charged with the said portion moneys as aforesaid (*m*) UNTO AND TO THE

Fourth *testatum.*

Limitation of term to secure portions.

(*m*) It is not now generally necessary to limit a term to secure a jointure rentcharge: see sect. 44 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and see *ante*, sub tit. "ANNUITIES," Vol. I., pp. 671 *et seq.*

XL. Marriage Settlement charging Jointure and Portions under Power in strict Settlement.

USE OF the said [*trustees*], their executors, administrators, and assigns, for the term of 1000 years to commence from the death of the said [*husband*] without impeachment of waste, but subject to the said jointure rentcharge and to the powers, remedies and trusts under these presents or by law provided for securing payment of the same UPON TRUST that the said trustees or trustee shall by mortgage of the same premises or any part thereof for all or any part of the said term, or by or out of the rents and profits of the same premises, or any part thereof, or by sale of any timber or minerals, or by any other reasonable means, raise the said sum of £——, £——, or £——, as the case may be, or so much thereof respectively as shall become raisable, with such interest and maintenance moneys as aforesaid, and such sums as may become raisable for advancement as aforesaid, and the costs and expenses of and incident to the raising any such moneys or of and to the execution of the trusts of the said term; And after payment out of the moneys so raised of any such costs and expenses, shall pay and apply the same moneys to, between, or among, or for the maintenance, education, or advancement of the said child or children of the said [*husband*] by the said [*wife*] or any of them pursuant and in satisfaction of the charges and provisions in that behalf hereinbefore contained; AND UPON FURTHER TRUST that, subject as aforesaid, the said trustees or trustee shall permit the rents and profits of the hereditaments and premises comprised in the said term or so much of the same rents and profits as shall from time to time remain after answering the trusts aforesaid to be received by the person or persons for the time being entitled to the same premises in reversion expectant on the said term: PROVIDED ALWAYS, and it is hereby declared, that the statutory power of appointing a new trustee or new trustees of these presents, when and so often as a vacancy shall occur, shall be vested in, and exerciseable by, the said [*husband*] during his life.

Surplus rents to be taken by reversioner.

Power to appoint new trustees.

IN WITNESS, &c.

XLI. *SETTLEMENT on* MARRIAGE, *of* FREEHOLDS *to Uses and of* LEASEHOLDS *in trust for the* HUSBAND *and* WIFE *successively for* LIFE, *with* REMAINDER *to the* ISSUE *of the marriage as the husband and wife, or the survivor, shall* APPOINT, *and, in default of appointment, to the children in equal shares in* TAIL *as* TENANTS IN COMMON, *with* CROSS-REMAINDERS. (*A concise form.*)

THIS INDENTURE (*n*), made, &c., BETWEEN [*intended husband*], of, &c., of the first part; [*intended wife*], of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part, WITNESSETH, that in consideration of the intended marriage between the said [*husband*] and [*wife*], the said [*husband*] hereby grants, and as settlor conveys unto the said [*trustees*] and their heirs, ALL THAT [*describe freehold parcels*], TO HOLD the same UNTO the said [*trustees*] and their heirs, TO THE USE of the said [*husband*], his heirs and assigns, until the marriage, and, after the marriage, TO THE USE of the said [*husband*] and his assigns, during his life without impeachment of waste, with remainder after his death TO THE USE of the said [*wife*] and her assigns, during her life without impeachment of waste, with remainder after her death TO THE USE of all or such one or more of the issue of the marriage in such manner as the said [*husband*] and [*wife*] shall by deed appoint, And in default of or until such appointment as the survivor of them shall by deed or will or codicil appoint; And in default of and subject to any such appointment, if there shall be only one child of the marriage, TO THE USE of such only child in tail, but if there shall be more than one such child, then TO THE USE of all such children in equal shares as tenants in common in tail, with cross-remainders between them in tail, with remainder TO THE USE of the said [*husband*], his heirs and assigns: [*Here insert such powers and provisions as may be advisable, see preceding Precedents*]: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, the said [*husband*] hereby assigns, and as settlor conveys unto the said [*trustees*],

Parties.

First Testatum.

Grant of freeholds.

Habendum.

To trustees until the marriage to use of husband;

and afterwards, to use of husband for life;

remainder to use of wife for life;

remainder to issue of marriage as husband and wife or survivor appoint;

in default to use of children as tenants in common in tail;

remainder to use of husband in fee.

Second *testatum.*

Assignment of leaseholds.

(*n*) Stamp, 20*s.*

XLI. **Marriage Settlement of Freeholds and Leaseholds.**

ALL [*describe parcels as in the lease*], ALL which premises were by an indenture of lease dated, &c., and expressed to be made, &c., demised unto the said [*husband*], his executors, administrators, and assigns, from the —— day of ——, 18—, for the term of —— years, at the yearly rent of £——, and subject to the lessee's covenants and conditions therein contained, TO HOLD to the said [*trustees*], their executors, administrators, and assigns, during all the residue now to come and unexpired of the said term of —— years at and under the rent, covenants, and conditions by and in the said indenture of lease reserved and contained, and on the part of the lessee to be paid, observed, and performed, UPON TRUST out of the rents and profits of the premises hereby assigned to pay the rent and observe and perform the covenants and conditions by and in the said lease reserved and contained, and on the part of the lessee to be paid, observed, and performed; AND, subject thereto, upon such trusts, and with and subject to such powers, provisions, and declarations as shall as nearly correspond with the uses, trusts, powers, provisions, and declarations hereinbefore limited, declared, and contained of and concerning the premises hereinbefore expressed to be hereby granted, as the different nature and quality of the premises, and the rules of law and equity will permit, but not so as to increase or multiply charges or powers of charging, and so that the leasehold premises shall not vest absolutely in any person hereby made tenant in tail by purchase of the premises hereinbefore expressed to be hereby granted, unless he shall attain the age of twenty-one years, but on his death under that age shall go in the same manner as if they had been freeholds of inheritance included in the grant hereinbefore contained: [*Appointment of trustees for purposes of Settled Land Acts and Conveyancing, &c., Act*, 1881, *sect.* 42, *ante*, p. 698; *power to appoint new trustees, and trustee clauses, ante*, p. 552].

Habendum.

Trusts corresponding with uses of freeholds.

IN WITNESS, &c.

XLII. *MARRIAGE SETTLEMENT of a* Reversionary Share *of* Freeholds, *on* Wife *for life, remainder to* Children *of marriage as* Tenants in Common *in* Tail, *with* Cross Remainders, *remainder to* Wife's Sister *and her* Children (Variation *when the* Limitations *are in defeasible* Fee Simple). Advancement Clause. Covenant *to* Settle *other* Property *to same uses.* Assignment *of renewable* Leaseholds *on corresponding trusts.* Settlement *of* Shares *in* Mines *and* Residue, *and a* sum *secured by* bond *on trusts for* Conversion, *and* usual trusts *for husband, wife, and children.* Proviso *for* Separation *of* Funds *in certain events.* Power *to* Postpone Conversion.

THIS INDENTURE (*o*) made the —— day of ——, 18—, Between [*intended husband*] of, &c., of the first part; [*intended wife*] of, &c., of the second part; and [*trustee*], of, &c., and [*trustee*], of, &c., of the third part; Whereas under the will of [*testatrix*] late of, &c., widow, deceased, (the maternal aunt of the said [*wife*]) dated, &c., and proved, &c., the said [*wife*] is entitled in fee simple, in remainder expectant on the death of [*name*] her mother, to one equal undivided fourth part or share of and in the manor of ——, in the parish of ——, and county of ——, and the freehold messuages, lands, and hereditaments hereinafter described and intended to be hereby settled; And it is probable that, under the will of the said [*mother*], she will hereafter become entitled in fee simple or otherwise to some other part or share, or parts or shares of and in the same premises: And whereas, under the will of the said [*testatrix*], she the said [*wife*] is absolutely entitled in possession to one equal undivided fourth part or share of and in all the right, share, estate, and interest, late of the said [*testatrix*], in certain lead mines and melting works at ——, in the county of —— aforesaid, with the materials and ores belonging to the same and the monies

Parties.

Recitals: of title of intended wife to reversionary share of freehold hereditaments;

of expectancy of further share;

of title to share in lead works:

(*o*) Stamp, 10*s.*, in respect of the realty, and *ad valorem* duty at the rate of 5*s.* per 100*l.*, or part of 100*l.*, in respect of the personalty.

XLII. **Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.**

now due or accruing due on account or in respect of the same fourth part or share, and also to one equal undivided fourth part or share of and in the general residue of the real and personal estate late of the said [*testatrix*]; And whereas the said [*wife*] is also entitled to one undivided moiety of and in two leasehold messuages or tenements situate in —— street, in the city of ——, and numbered respectively —— and —— in that street, and in the respective occupations of —— and —— which premises are holden under two indentures dated the —— day of —— 18—, and the —— day of ——, 18—, respectively, and made respectively between [*parties*] for the respective residues of the two several terms of ninety-nine years each, from the dates of the said indentures respectively, determinable upon lives, but renewable as therein mentioned respectively, And also to a sum of £—— secured with interest at the rate of —— per cent. per annum, by an equitable mortgage by the deposit of the title deeds of certain freehold hereditaments called ——, and situate at ——, in the county of —— aforesaid, and also to a sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock lately standing in the name of the said [*wife*] in the books of the Governor and Company of the Bank of England;

of title to moiety of two renewable leasehold messuages, and other personal property;

of agreement for marriage;

And whereas a marriage has been agreed upon, and is intended shortly to be solemnized between the said [*husband*] and [*wife*]; And whereas upon the treaty for the said intended marriage it was agreed that the said share to which the said [*wife*] is entitled, as aforesaid, in the said manor and freehold messuages, lands, and hereditaments, and also the share or shares (if any) to which during the said intended coverture she the said [*wife*] may become entitled for any estate or interest in the same manor and premises or in any part or parts thereof, And also the said shares to which the said [*wife*] is now so entitled, as aforesaid, in the said lead mines and melting works, and the materials, ores, and moneys thereto belonging, and in the moneys due or accruing due in respect thereof and in the general residue of the real and personal estate late of the said [*testatrix*], And also the said share in the said two leasehold messuages, And also the said sum of £—— so secured as aforesaid, and the said sum of £——, $2\frac{3}{4}$ per cent. Consolidated Stock should respectively be settled upon, for, with, and subject to the trusts, interests, powers, provisions, and declarations hereinafter

of agreement for settlement;

contained of and concerning the same respectively: AND WHEREAS, in pursuance of the said agreement, the said sum of £——, 2¾ per cent. Consolidated Stock, has also been transferred by the said [*wife*] with the like privity and approbation of the said [*husband*) into the names of the said [*trustees*] in the books of the Governor and Company of the Bank of England: NOW THIS INDENTURE WITNESSETH that, in further pursuance of the said agreements, and in consideration of the said intended marriage, the said [*wife*], with the privity and approbation of the said [*husband*] (testified by his execution of these presents), hereby grants, and as settlor conveys unto the said [*trustees*] and their heirs, ALL THAT the said undivided fourth part or share of or to which under the said will of the said [*testatrix*] she the said [*wife*] is so entitled, as aforesaid, in remainder expectant on the death of her said mother, of and in the said manor of ——, and the said freehold messuages, farms, lands, and hereditaments, called the —— Hall Estate, situate in the parishes of —— and —— aforesaid, and particularly described in the schedule hereunder written, TO HOLD the said undivided fourth part or share and premises unto the said [*trustees*] and their heirs TO THE USE of the said [*wife*] her heirs and assigns until the solemnization of the said intended marriage, And from and after the solemnization thereof, TO THE USE of the said [*wife*] and her assigns during her life, without impeachment of waste, but so that she shall not have power during the said intended coverture to deprive herself of the benefit of the rents and profits of the said share and premises hereby granted or any part thereof by any sale, mortgage, charge, or otherwise by way of anticipation; And from and after her decease TO THE USE of all and every, or such one or more exclusively of the others or other, of the children of the said intended marriage, at such age or time, or respective ages or times, for such estate or estates, or interest or interests, and, if more than one, in such shares and proportions, with, under, and subject to such charges, powers of charging, and other powers, provisions, conditions, limitations, and remainders over for the benefit of all or any one or more of the said children, and with such restrictions and generally in such manner as the said [*wife*] shall by her will or any codicil or codicils thereto from time to time or at any time appoint, And in default of such appointment and so far as any such appoint-

of transfer of shares in mines and stock to trustees.

First *testatum.*

Grant of share of freeholds to trustees.

Habendum.

To use of wife till marriage;

to use of wife for life;

remainder to use of children as wife shall appoint;

XLII. **Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.**

ment shall not extend, To THE USE of all and every the children and child of the said intended marriage and the heirs of their respective bodies, to be divided amongst the said children, if more than one, in equal shares as tenants in common; And if one or more of the said children shall die without issue of his, her, or their respective bodies then as to as well the original share or shares of the child or children so dying and of whom there shall be such failure of issue as aforesaid, as the share or shares which shall have survived or accrued to every such child or children, or to the heirs of his, her, or their body or respective bodies, To THE USE of the others of the children of the said intended marriage and the heirs of their respective bodies to be divided amongst such last mentioned children in equal shares as tenants in common; AND if all the children of the said intended marriage but one shall die without issue or if there shall be but one such child then as to the entirety of the said part or share and premises hereinbefore granted To THE USE of such one or only child and the heirs of his or her body; AND, in default of such issue, To SUCH USES upon and for such trusts, interests, and purposes, and with under and subject to such powers, pro-

remainder in default of appointment to use of children as tenants in common in tail;

with cross remainders in tail (*p*);

remainder to such uses as wife's sister shall appoint;

(*p*) The following is a form of limitations to children in fee simple defeasible in case they should die under the age of twenty-one years without leaving issue, with cross remainders in fee similarly defeasible:—

Variation when the limitations are to children as tenants in common in fee defeasible.

"To THE USE of all and every the children or child of the said intended marriage, and if more than one, to take in equal shares as tenants in common, and the heirs and assigns of such respective children or child; And in case any of the said children shall die under the age of twenty-one years without leaving issue living at his, her, or their death or respective deaths, then as to as well the share hereinbefore limited to each child so dying as the share or shares limited to such child by this executory limitation, To THE USE of the other if only one, or the others if more than one of the said children, and if more than one to take as aforesaid; But in case there shall be no child of the said intended marriage, or no such child who shall attain the age of twenty-one years, or who dying under that age shall have issue dying at his or her death, &c. [*as in the text, or otherwise as may be agreed upon*]."

XLII. **Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.**

visions, agreements, and declarations, as [F. G.] the wife of [K. G.] and sister of the said [*wife*] shall from time to time or at any time, by any deed or deeds, with or without power of revocation and new appointment, or by her will or any codicil or codicils thereto, appoint; AND in default of such appointment, and so far as any such appointment shall not extend To THE USE of the said [F. G.] [*for her life without anticipation, remainder to use of her children in tail, with cross remainders, as before*], And, in default of such issue, To THE USE of the said [*wife*] her heirs and assigns for ever: PROVIDED ALWAYS, and it is hereby agreed and declared, that if any child of the said intended marriage, or of the said [F. G.], who, under the limitations hereinbefore contained, shall be entitled in possession to any estate of freehold or inheritance in the said part or share and premises hereinbefore granted, or in any undivided share or shares thereof, shall be under the age of twenty-one years, then and in every such case during the continuance of such minority the said [*trustees*] and the survivor of them, and the executors or administrators of such survivor and his or their assigns, or other the trustees or trustee for the time being of these presents (who are hereinafter referred to as "the said trustees or trustee"), shall enter into and continue in possession of the share or shares of such child and manage or concur in managing the same, and apply the income thereof, and accumulate and invest the unapplied residue of such income, and stand possessed of such accumulated fund in manner and on the trusts declared in this behalf by sect. 42 of the Conveyancing and Law of Property Act, 1881, or any statutory enactment amending or substituted for the same and for the time being in force (*q*): AND THIS INDENTURE ALSO

in default of appointment to use of wife's sister for life, &c.;

ultimate remainder to use of wife in fee.

Proviso as to application of rents and profits to maintenance, &c., of children.

Second *testatum.*

(*q*) If the limitations are in defeasible fee simple, the following proviso may be here inserted:—

Variation where the limitations are in fee defeasible.

"PROVIDED ALWAYS that if any child during whose minority any such accumulations as aforesaid shall have arisen shall die under the age of twenty-one years without leaving issue entitled or inheritable under any of the limitations hereinbefore contained, then the said trustees or trustee shall stand possessed of such accumulations upon such and the same trusts and purposes, and with, under, and subject to the same powers, provisions, and declarations as are by the Settled

XLII. **Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.**

Covenant by by wife to settle any further shares which she may acquire during coverture.

WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, she the said [*wife*] with the privity and approbation of the said [*husband*] (testified as aforesaid), hereby covenants with the said [*trustees*] in manner following (that is to say), that if she shall at any time during the said intended coverture become entitled under the will of her said mother or otherwise to any part or share or parts or shares (further or other than the said one undivided fourth part or share and premises hereinbefore granted) of and in the said manor and freehold messuages, farms, lands, and hereditaments hereinbefore described, or of and in any further parts thereof for any estate or interest whatsoever, she the said [*wife*] and all other necessary parties will at the cost of the trust estate, so soon as the circumstances will permit, convey and assure the share or shares to which she shall so become entitled of and in any such hereditaments aforesaid, To THE USES upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, agreements, and declarations hereby limited and declared of and concerning the said part or share and premises hereinbefore granted, or as near thereto as the deaths of parties and other intervening circumstances will admit of:

Third *testatum.*

Assignment of wife's moiety of leaseholds to trustees.

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, she the said [*wife*], with the privity and approbation of the said [*husband*] (testified as aforesaid), hereby assigns, and as settlor conveys unto the said [*trustees*], ALL THAT the one undivided moiety to which she the said [*wife*] is entitled as aforesaid of and in the said two leasehold messuages in —— aforesaid, with their respective appurtenances, To HOLD the said undivided moiety and premises unto the said [*trustees*], their executors, administrators, and assigns, for all the now unexpired residue of the said several terms of ninety-nine years created by the said several indentures of lease of the —— day of ——, 18—, and the —— day of ——, 18—, respectively, subject

Habendum.

Land Act, 1882, declared of and concerning capital monies to arise under that Act from any sale which may be made of the said part or share and premises hereinbefore granted, and the stocks, funds, shares, or securities in or upon which such monies may be invested."

to the rents, covenants, conditions, and agreements reserved and contained in the same indentures respectively, and on the part of the lessees to be paid, observed, and performed respectively, UPON TRUST that the said trustees or trustee shall by and out of the rents of the same moiety and premises hereinbefore assigned, pay one moiety of the rents reserved by the said indentures of lease respectively, and observe and perform the covenants, conditions, and agreements in the same indentures respectively contained so far as relates to the same moiety and premises; [And subject thereto shall from time to time, as occasion shall require in the ordinary course of renewal, join in renewing or endeavouring to renew the leases of the said premises comprised in the same indentures respectively, and for that purpose shall from time to time join in making such surrenders of the leases thereof for the time being, and in doing such other acts and things as shall be necessary or expedient in that behalf; And shall from time to time out of the rents and profits of the said moiety and premises hereinbefore assigned, or by mortgage thereof, or of any property hereby settled, or of any part thereof respectively, raise such monies as shall be required for costs, fines, and other expenses of and incident to such renewals respectively; And upon any such mortgage, no mortgagee shall be concerned to see that such money is required, or that no more is raised than is required for such purpose;] AND it is hereby agreed and declared that, subject to the trusts hereinbefore declared of the same, the said trustees or trustee shall stand possessed of and interested in the said moiety and premises hereinbefore assigned upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisions, agreements, and declarations as shall as nearly correspond with and be similar to the uses, trusts, intents, powers, provisions, agreements, and declarations hereinbefore limited, declared, and contained of and concerning the said part or shares and premises hereinbefore granted as the different tenures and qualities of the premises and the rules of law and equity will permit, yet so that the said moiety and premises hereinbefore

Upon trust to pay rents, &c.;

to obtain renewals (*r*);

to raise money for renewals;

and subject thereto on trusts corresponding with uses and trusts of freeholds.

(*r*) If desired, the clauses in brackets on this and the next following pages may be omitted in reliance on the Trustee Act, 1888 (51 & 52 Vict. c. 59), sects. 10 and 11: see *ante*, p. 508.

XLII. **Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.**

assigned, or any undivided share or shares thereof, shall not vest absolutely in any child or children of the said intended marriage, or of the said [F. G.], unless such child or children respectively shall attain the age of twenty-one years, or die under that age leaving heritable issue (*r*): [PROVIDED ALWAYS, and it is hereby agreed and declared, that the said trustees or trustee shall not be personally liable for any neglect or laches in not effecting any such renewal or renewals as aforesaid, unless notice in writing that the time for renewal has arrived shall be given to them or him by the person or persons for the time being beneficially interested in the said moiety and premises hereinbefore assigned, and a sufficient sum of money for accomplishing such renewal or renewals shall be advanced or procured by such person or persons:] AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, she the said [*wife*], with the privity and approbation of the said [*husband*] (testified as aforesaid), hereby assigns, and as settlor conveys unto the said [*trustees*], their heirs, executors, and administrators, ALL THAT the said one undivided fourth part or share to which under the will of the said [*testatrix*] she the said [*wife*] is entitled as aforesaid of and in all the right, share, estate, and interest late of the said [*testatrix*], deceased, in the said lead smelting works at —— aforesaid, and in the materials and ores of or belonging to the same, and all the monies now due and accruing due in respect of the same four shares, And also all that the one undivided fourth part or share to which under the said will of the said [*testatrix*] she the said [*wife*] is entitled as aforesaid of and in the said residuary, real, and personal estate late of the said [*testatrix*], And also all that the said sum of £—— secured by the said equitable mortgage, and all interest due or to become due thereon, and the full benefit of all securities for the same principal sum and interest, To HOLD, receive, and take the said parts or shares, monies, securities, and premises lastly hereinbefore assigned UNTO AND TO THE USE OF the said [*trustees*], their heirs, executors,

Proviso that trustees shall not be liable for non-renewal.

Fourth *testatum.*

Assignment of wife's other property to trustees.

Habendum.

(*r*) If the limitations of the freeholds are in defeasible fee simple the qualifying sentence at the end of this clause will not be required, and should be omitted.

XLII. Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.

administrators, and assigns respectively, according to the respective tenures and qualities of the same premises, Upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, agreements, and declarations hereinafter declared and contained of and concerning the same: And it is hereby agreed and declared by and between the parties to these presents that the said trustees or trustee shall stand seised and possessed of, and interested in, as well the said parts or shares, moneys, and premises lastly hereinbefore granted and assigned respectively, as also the said —— shares in the said —— coal mine and the said sum of £—— £2¾ per cent. Consolidated Stock so transferred respectively into the names of the said [*trustees*], as hereinbefore recited, In trust for the said [*wife*], her heirs, executors, administrators, and assigns respectively, according to the respective tenures and qualities of the same premises until the solemnization of the said intended marriage, and from and after the solemnization thereof, then As to the said parts or shares, moneys, and premises lastly hereinbefore granted and assigned respectively (except the said sum of £—— secured by the said equitable mortgage as aforesaid), Upon trust that the said trustees or trustee shall with all convenient speed obtain the possession and legal ownership of, and sell, call in, and convert into money the same respectively; And shall, with the consent in writing of the said [*wife*] during her life, and after her death at the discretion of the said trustees or trustee, invest the moneys to arise therefrom, &c. [*Investment clause, see ante*, pp. 545, 554, 558, and 562; *power to vary investments*, p. 545]; And it is further agreed and declared, that from and after the solemnization of the said intended marriage the said trustees or trustee shall stand possessed of, and interested in the moneys to arise from the sale, calling in, and conversion into money of the said parts or shares and premises lastly hereinbefore granted and assigned respectively (except the said sum of £——), and the stocks, funds, shares, and securities, in or upon which such moneys may be invested, and also of the said sum of £—— secured by the said equitable mortgage, and the said sum of £—— £2¾ per cent. Consolidated Stock, and the moneys to arise from the sale, calling in, and conversion thereof respectively, or of any part or parts thereof (all which last-mentioned

Declaration of trusts of property lastly granted and assigned.

Trust for wife till marriage.

Trust for conversion.

Trusts of monies arising from conversion.

XLII. Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.

premises are hereinafter collectively referred to as "the said trust funds"), upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, agreements, and declarations hereinafter declared and contained of and concerning the same, that is to say [*Usual trusts for wife, husband surviving, and children, ante*, pp. 545 *et seq.*]; PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said [*husband*] shall survive the said [*wife*], or if at the time of the death of the said [*wife*] the said trust funds, or any part thereof, shall not under the trusts hereinbefore declared have absolutely vested in the child or children of the said intended marriage, or some or one of such children, then and in either of the said cases, the said trust funds shall immediately after the death of the said [*wife*] be divided by the said trustees or trustee into two separate and distinct trust funds, the one (which is hereinafter referred to as the "said first trust fund") to consist of the sum of £——, or of such part or parts of the said trust funds as the said trustees or trustee shall consider to be of, or represent that value or amount, and shall in their absolute and uncontrolled discretion appropriate accordingly; and the other (which is hereinafter referred to as the "said second trust fund") to consist of the residue of the said trust funds; And that if the said [*husband*] shall survive the said [*wife*], the said second trust fund and the dividends, interest, and annual income thereof shall be excepted from the operation of the trust hereinbefore declared in favour of the survivor of the said [*husband*] and [*wife*], and his or her assigns, during his or her life, and shall immediately after the death of the said [*wife*] be held upon such and the same trusts as the same would have been held upon by virtue of these presents in case the said [*husband*] had died in the lifetime of the said [*wife*]; PROVIDED ALWAYS [*Hotchpot clause, and (if desired) advancement clause adapted to both funds, if desired, see ante*, p. 547, *and note (h)*]; PROVIDED ALSO, and it is hereby further declared, that if there shall be no child of the said intended marriage who, being a son, shall attain the age of twenty-one years, or being a daughter, shall attain that age or marry, then the said trustees or trustee shall, after the death of the survivor of them the said [*husband*] and [*wife*] and such default or failure of children of the said intended marriage, stand possessed of and interested in the said first trust fund, and the interest, dividends, and annual income thereof, or in so much

Proviso for division of trust funds in certain events.

Trusts in default of children.

XLII. Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.

thereof as shall not have been applied under any of the trusts or powers herein declared and contained, or arising or conferred by statute under or by virtue of these presents, upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisions, agreements, and declarations as if the same first trust fund were capital moneys arising under the Settled Land Act, 1882, in respect of a sale of the said undivided fourth part or share hereinbefore granted of the said manor and freehold hereditaments hereinbefore described, or any part or parts thereof, and the stocks, funds, shares, and securities, in or upon which such capital moneys may be invested, and the dividends, interest, and annual income thereof; And shall, after the death of the survivor of the said [*husband*] and [*wife*] and such default or failure of children of the said intended marriage as aforesaid, stand possessed of and interested in the said second trust fund, or so much thereof as shall not have been applied as aforesaid, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisions, agreements, and declarations as the said [*wife*] shall while not under coverture by any deed or deeds, or by will or any codicil or codicils thereto, or shall while under coverture by will or any codicil or codicils thereto, from time to time or at any time appoint; And in default of and subject to any such appointment, upon the trusts following, that is to say, if the said [*wife*] shall survive the said [*husband*], then in trust for the said [*wife*], her executors, administrators, and assigns absolutely; But if the said [*wife*] shall die in the lifetime of the said [*husband*], then in trust for such person or persons as on the death of the said [*wife*] would have become entitled to her personal estate under the statutes for the distribution of the effects of intestates if the said [*wife*] had died without having been married and intestate, such persons, if more than one, to take in the shares in which they would have become entitled under the same statutes; PROVIDED ALWAYS, and it is hereby agreed and declared, that notwithstanding the trusts hereinbefore declared for the sale, calling in, and conversion of the said parts or shares, moneys, and premises lastly hereinbefore assigned (except the said sum of £——), it shall be lawful for the said trustees or trustee, at their and his absolute discretion, to postpone the sale, calling in, and conversion of the

Power to postpone conversion.

XLII. **Marriage Settlement of Reversionary Estate in Freeholds and Shares in Mines, &c.**

same, or any part or parts thereof, till such time or times as they or he shall think fit; PROVIDED ALWAYS, that notwithstanding any such postponement, such parts of the same premises as may be of the nature of real estate shall for all the purposes of transmission be considered as personal estate, and that during any postponement all the interest, dividends, and annual income of the same premises, or of so much thereof as for the time being shall remain unsold, uncalled in, and unconverted respectively, shall be applied and disposed of in such manner as the interest, dividends, and annual income of the moneys to arise from the sale, calling in, and conversion thereof, or the stocks, funds, shares, and securities, in or upon which such moneys might be invested would for the time being be applicable or disposable under the trusts hereinbefore declared if such sale, calling in, and conversion had actually taken place [*Appointment of trustees for purposes of the Settled Land Acts, and of the Conveyancing, &c., Act*, 1881, *sect.* 42, *ante*, p. 698; *power to appoint new trustees*, *ante*, p. 552 or 590; *trustee clauses*, *ante*, p. 552].

Proviso that realty shall be deemed to have been converted notwithstanding postponement.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XLIII. *DISENTAILING DEED of* FREEHOLDS *by* TENANT *in* TAIL *in* POSSESSION (*s*).

THIS INDENTURE (*t*) made the day of ——, 18—,

Parties. BETWEEN [*tenant in tail*], of, &c., of the one part; And [*grantee to uses*], of, &c., of the other part:

Recitals: WHEREAS under

(*s*) As to disentailing deeds generally, see *ante*, pp. 521 *et seq.*

(*t*) Stamp, 10*s*.

XLIII. Disentailing Deed by Tenant in Tail in Possession.

an indenture dated, &c., and made between [*parties*], being a settlement made in consideration of the marriage which was shortly afterwards solemnized between [A. B.] and [C. B.], both since deceased, the late father and mother of the said [*tenant in tail*] [*or* under the will dated, &c., and proved, &c., of [A. B.] late of, &c., deceased], the said [*tenant in tail*], is tenant in tail in possession of the hereditaments hereby granted; NOW THIS INDENTURE WITNESSETH that the said [*tenant in tail*], hereby grants unto the said [*grantee*] and his heirs: ALL AND SINGULAR the messuages, lands, and hereditaments situate in the parishes of——, and—— respectively in the county of ——, in the said indenture of settlement and in the schedules thereto particularly described [*or* devised by the said will of the said [A. B.]] (*x*), And all other, if any, the hereditaments in England or Wales of or to which the said [*tenant in tail*] is seised or entitled as tenant in tail, whether at law or in equity, under the said settlement [*or* will], or otherwise, To HOLD the same UNTO the said [*grantee*] and his heirs, freed and discharged from all estates tail of the said [*tenant in tail*], at law or in equity, and from all estates, rights, interests, and powers to take effect after the determination or in defeazance of such estates tail, To THE USE of the said [*tenant in tail*], his heirs and assigns for ever.

of title of tenant in tail (*u*);

Testatum.

Grant.

Habendum.

To grantee free from entail, to use of grantor in fee.

IN WITNESS, &c.

(*u*) If preferred, the settlement or will and subsequent events showing the title of the tenant in tail may be recited at length, as in Precedents XLV. or XLVI., *post*, pp. 783 or 785.

(*x*) The parcels should be described as concisely and generally as possible to save expense on enrolment.

XLIV. *DISENTAILING DEED of* FREEHOLDS *by* TENANT *in* TAIL MALE *in* POSSESSION. (*A short form without recitals.*)

XLIV. **Disentailing Deed by Tenant in Tail Male in Possession.**

THIS INDENTURE (*y*) made under the —— day of——, 18—, BETWEEN [*tenant in tail*], of, &c., of the one part; And [*grantee to uses*], of, &c., of the other part; WITNESSETH that the said [*tenant in tail*], hereby grants unto the said [*grantee*] and his heirs; ALL AND SINGULAR the messuages, lands, and hereditaments in England or Wales of or to which he the said [*tenant in tail*], is seised or entitled, at law or in equity, for any estate in tail male or in tail under an indenture dated, &c., and made between [*parties*], being a settlement made in consideration of the marriage which was shortly afterwards solemnized between [A. B.] and [C. B.], both since deceased, the late father and mother of the said [*tenant in tail*], [*or* under the will dated, &c., and proved, &c., of [A. B.], late of, &c., deceased], or otherwise, To HOLD the same UNTO the said [*grantee*] and his heirs, freed and discharged from all estates in tail male or in tail of the said [*tenant in tail*], at law or in equity, and from all estates, rights, interests, and powers, to take effect after the determination or in defeazance of such estates in tail male or in tail, To THE USE of the said [*tenant in tail*], his heirs and assigns for ever.

Parties.

Testatum.

Grant.

Habendum.

Free from entail.

IN WITNESS, &c.

XLV. *CONSENT of PROTECTOR of a* SETTLEMENT *to barring an* ESTATE TAIL (*z*).

Exordium.

Recital of

TO ALL TO WHOM THESE PRESENTS SHALL COME (*a*) [*protector*], of, &c., sends greeting: WHEREAS by an indenture

---

(*y*) Stamp, 10*s*.

(*z*) This deed will require enrolment in the Chancery Division under sect. 46 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), or, if the property is copyhold, on the Court rolls of the manor under sect. 51 of the same Act.

(*a*) Stamp, 10*s*.

XLV. Consent of Protector.

of settlement dated, &c., and made between [*parties*], the messuages, lands, and hereditaments, situate in the parishes of ——, and ——, in the county of ——, in the said indenture and in the schedules thereto particularly described, were limited to the use of the said [*protector*], and his assigns during his life with remainder (subject to certain charges therein mentioned which have since determined) to the use of [*tenant in tail*], of, &c., in tail with divers remainders over: NOW THESE PRESENTS WITNESS that the said [*protector*], as protector of the said settlement, hereby consents to every or any disposition and assurance which the said [*tenant in tail*] shall make of the said messuages, lands, and hereditaments, comprised in or which are now by any means subject at law or in equity, to the subsisting uses or trusts of the said settlement or any such premises or any part thereof, for the purpose of barring the estate tail of the said [*tenant in tail*] in the same premises and all estates, rights, interests, and powers to take effect after the determination or in defeazance of such estate tail, but subject and without prejudice to the said estate for life of the said [*protector*] therein, and to all powers and privileges annexed to such estate for life.

title of tenants for life and in tail.

Testatum.

Consent of protector.

IN WITNESS, &c.

XLVI. *DISENTAILING DEED by* TENANT IN TAIL *in* REMAINDER (*with the* CONSENT *of the* PROTECTOR, *given by a separate Deed*) *to* USE *of* TENANT IN TAIL *in* FEE SIMPLE, *subject to the Protector's Life Estate.*

THIS INDENTURE (*b*), made the —— day of ——, 18—, BETWEEN [*tenant in tail*], of, &c., of the one part; and [*grantee to uses*], of, &c., of the other part: WHEREAS by an indenture of settlement dated the —— day of ——, 18—, and

Parties.

Recitals:

(*b*) Stamp, 10*s*.

XLVI. Disentailing Deed by Tenant in Tail in Remainder with Consent of Protector by separate Deed.

made between [*settlor*] of the first, the said [*protector*] of the second part [*protector's wife*] (therein called and described as [*wife's maiden name*] spinster) of the third part, being the settlement executed in contemplation of the then intended marriage, which was shortly afterwards solemnized between the said [*protector*] and [*wife*], the messuages, lands, and hereditaments hereinafter described and expressed to be hereby granted were assured, from and after the solemnization of the then intended marriage, to the uses following, that is to say, to the use of the said [*protector*] during his life, and after his death to the use that the said [*wife*], if she should survive him, should receive during the rest of her life a yearly jointure rentcharge of £——, payable as therein mentioned, and subject thereto to the use of the first son of the said [*protector*] by the said [*wife*] in tail male with remainders over as therein is mentioned; AND WHEREAS the said [*tenant in tail*] is the first son of the said marriage and has attained the age of twenty-one years; AND WHEREAS the said [*tenant in tail*] is desirous of barring the said estate tail in remainder of him the said [*tenant in tail*] under or by virtue of the hereinbefore recited indenture of settlement in manner hereinafter appearing, And the said [*protector*] has by a deed poll under his hand and seal dated the —— day of ——, 18—, given his consent to the disposition and assurance hereinafter expressed: NOW THIS INDENTURE WITNESSETH that, to effectuate the said desire, and for the purpose of barring all the said estate tail of the said [*tenant in tail*], and all estates, rights, interests, and powers to take effect after the determination or in defeazance of the same estate, the said [*tenant in tail*] with the consent of the said [*protector*] as the protector of the said settlement testified by his execution of the said deed poll, hereby grants and disposes of ALL THOSE, &c. [*parcels*], And all other if any messuages, lands, or hereditaments to which the said [*tenant in tail*] is entitled to an estate tail in remainder or by virtue of the hereinbefore recited indenture of settlement, TO HOLD the premises unto the said [*grantee*] and his heirs, subject, nevertheless, to the said life estate therein of the said [*protector*], and to the powers annexed to such life estate so far as the same are subsisting and capable of taking effect, and to the said jointure rentcharge, and all rights, powers, and remedies for securing or recovering the same, But freed and discharged

of settlement creating entail;

that grantor is eldest son.

of desire to bar entail;

of protector's consent by a separate deed.

Testatum.

Grant.

from all estates tail of the said [*tenant in tail*] in the same premises, and all estates, rights, interests, and powers, to take effect after the determination or in defeazance of such estates tail, To THE USE of the said [*tenant in tail*], his heirs and assigns.

IN WITNESS, &c.

XLVI. Disentailing Deed by Tenant in Tail in Remainder with Consent of Protector by Separate Deed.

XLVII. *DISENTAILING DEED by* PROTECTOR *and* TENANT *in* TAIL *of* FREEHOLDS *and* MONEY *to be laid out in purchase of land to be settled to such* USES *as* PROTECTOR *and* TENANT *in* TAIL *shall jointly* APPOINT, *and in Default of Appointment to* SUBSISTING USES *of Settlement.*

THIS INDENTURE (*c*), made the —— day of ——, 18—, BETWEEN [*protector*], of, &c., of the first part; [*tenant in tail*], of, &c., of the second part; and [*grantee to uses*], of, &c., of the third part: WHEREAS [*testator*], late of, &c., duly made and executed his will dated &c., and thereby gave and devised all his manors, messuages, lands, and hereditaments situate in the county of —— to the use of [*protector*] for his life without impeachment of waste, with remainder to the use of his first and other sons successively according to seniority in tail, with divers remainders over: AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, and his said will was duly proved on the —— day of ——, 18—, in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice: AND WHEREAS the said [*tenant in tail*] is the first son of the said [*protector*], and attained the age of twenty-one years on the —— day of ——, 18—; AND WHEREAS several sales of parts of the settled lands have with the consent of the said [*protector*] been made under a power in that behalf contained in the said will, and other sales of such land have been made by the said [*protector*] in exercise of his statutory powers in that behalf, and all the hereditaments now remaining unsold, which are, or are believed to be,

Recitals: of will creating the settlement; of death of testator; State of family. of sales under power;

(*c*) Stamp, 10*s*.

XLVII. Disentailing Deed by Tenant in Tail in Remainder with Protector's Concurrence of Freeholds and Monies to be laid out in Land.

subject to the uses and limitations of the said will, are particularly described in the first schedule hereunder written: AND WHEREAS the moneys produced by such sales as aforesaid have been, in pursuance of the direction in that behalf contained in the said will, partly laid out in the purchase of other hereditaments, which are particularly described in the second schedule hereunder written, and partly invested in the names of [*trustees of will*], in the several stocks, funds, and securities particularly described in the third schedule hereunder written: AND WHEREAS the said [*protector*] and [*tenant in tail*] are desirous of disentailing all the hereditaments and premises now subject to the subsisting uses and limitations of the said will; NOW THIS INDENTURE WITNESSETH, that for effectuating the said desire, and in consideration of the premises, the said [*protector*], so far as relates to the use for his life so limited to him as aforesaid, hereby grants and conveys, and the said [*tenant in tail*], with the consent of the said [*protector*], as protector of the settlement created by the said will (testified by his executing these presents), hereby grants, disposes of and conveys, unto the said [*grantee*] and his heirs, ALL the manors, messuages, lands and hereditaments described in the first and second schedules hereunder written respectively, and all other (if any) the hereditaments now subject to the subsisting uses and limitations of the said will, TO HOLD the same unto the said [*grantee*] and his heirs; SUBJECT to the uses and estates limited or created by the said will which precede the estate tail of the said tenant in tail (other than the estate for life of the said [*protector*] thereby limited), and all powers of charging, and other powers annexed to or exerciseable during the continuance of such preceding uses and estates respectively, and to the uses and estates limited or created or to be limited or created in exercise of such powers, BUT FREED from the estate tail of the said [*tenant in tail*], and all estates, rights, interests, and powers to take effect after the determination, or in defeasance of such estate tail, TO SUCH USES, upon such trusts, and with and subject to such powers and provisions as the said [*protector*] and [*tenant in tail*] shall by any deed or deeds, revocable or irrevocable, jointly appoint; And in default of such appointment, and so far as no such appointment shall extend, TO THE USES, upon the trusts, and with and subject to the powers and provisions which, under or by virtue of the said will, were

of investment of proceeds of sale;

of desire to bar entail.

First *testatum*.

Grants.

Parcels.

Habendum, freed from the entail.

To such uses as tenant for life and tenant in tail shall appoint, and in default to previously subsisting uses of the settlement.

XLVII. Disentailing Deed by Tenant in Tail in Remainder with Protector's Concurrence of Freeholds and Monies to be laid out in Land.

subsisting with regard to the premises hereby conveyed immediately before the execution of these presents: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said [*protector*], and the said [*tenant in tail*], with the consent of the said [*protector*] as protector of the said settlement (testified by his executing these presents), according to their respective interests, hereby grant, assign, and dispose of, to the said [*grantee*] all the moneys, stocks, funds and securities described in the third schedule hereunder written, AND ALL other (if any) the moneys, stocks, funds, and securities which, or the proceeds of which, are liable to be laid out in the purchase of lands to be settled to the subsisting limitations of the said will, TO HOLD the same unto the said [*grantee*], his heirs and assigns, subject to the uses, &c. [*ut supra*], BUT FREED, &c. [*ut supra*], TO THE LIKE uses, upon the like trusts, and with and subject to the like powers and provisions as are hereinbefore declared and contained concerning the said manors and hereditaments hereby granted, or as near thereto as circumstances will permit.

Second *testatum.*

Assignment of monies.

Habendum.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

THE THIRD SCHEDULE ABOVE REFERRED TO.

XLVIII. *SURRENDER out of* COURT *of* COPYHOLDS *by* LEGAL TENANT IN TAIL *in Possession, Previously to his* MARRIAGE (*d*).

The Manor of ——— in the County of ———. } BE IT REMEMBERED (*e*) that, on the —— day of —— 18— [*surrender-or*] one of the customary tenants of the said manor came before [*steward*] the steward of the said manor, and in consideration of a marriage agreed upon and intended shortly to be solemnized between the said

Consideration.

(*d*) See as to surrenders for barring entails, sects. 50–54 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74). The surrender must be entered on the Court Rolls of the manor. As to surrenders generally, see *ante*, p. 686, note (*x*).

(*e*) Stamp, 10*s*.

XLVIII. **Surrender to Bar Legal Estate Tail in Copyholds.**

Surrender.

Parcels.

Uses to bar entail.

[*surrenderor*] and [*intended wife*] of, &c., spinster, did out of Court surrender into the hands of the lord of the said manor, by the hands and acceptance of the said [*steward*] by the rod, according to the custom of the said manor ALL THAT [*parcels*] with the appurtenances to the said premises belonging, to which the said hereditaments and premises the said [*surrenderor*] was admitted tenant at a general court held for the said manor on the —— day of —— 18— to hold to him the said [*surrenderor*] in tail according to the form and effect of a certain indenture therein mentioned or referred to: TO THE USE of the said [*surrenderor*] his heirs and assigns for ever until the solemnization of the said intended marriage, and after the solemnization thereof TO THE USE of [*trustees*] of, &c., their heirs and assigns during the life of the said [*intended wife*] UPON TRUST from time to time to pay the rents and profits arising from the said premises unto the said [*intended wife*] for her separate use and so that the said [*intended wife*] during her said intended or any future coverture, shall have no power to anticipate the said rents and profits or any part thereof And from and after the decease of the said [*intended wife*] TO THE USE of the said [*surrenderor*] his heirs and assigns, for ever, according to the custom of the said manor, by and under the rents, fines, heriots, suits, and services therefor due and of right accustomed.

[*Signature of tenant in tail.*]

Taken and acknowledged the day and year first above written by me. } [*Signature of Steward.*]

XLIX. *SURRENDER of* COPYHOLDS *by* EQUITABLE TENANT *in* TAIL *in* REMAINDER *with* CONSENT *of* PROTECTOR *to bar the entail* (*f*).

Manor of —— in the County of —— } The —— day of —— in the year 18—, (*g*).

Recital of title.

WHEREAS [*recite settlement or will and any subsequent events under or by virtue of which lands stand limited to protector*

(*f*) The surrender must be entered on the Court Rolls: see last note.

(*g*) Stamp, 10*s*.

XLIX. Surrender to Bar Equitable Estate Tail in Copyholds with Protector's Concurrence.

for life with remainder to tenant in tail for an estate tail]: NOW BE IT REMEMBERED that, on the day and in the year first above mentioned, the said [*tenant in tail*] came before [*steward*] the steward of the said manor and for the purpose of barring all estates in tail in equity or otherwise of him the said [*tenant in tail*] in the hereditaments hereinafter mentioned and all estates, rights, and interests to take effect after the determination or in defeazance of such estates tail, and with the consent of the said [*protector*] testified by his signature of the memorandum hereunder written, did out of Court surrender into the hands of the lord of the said manor by the hands and acceptances of the said [*steward*] by the rod, according to the custom of the said manor, ALL THAT [*parcels*] to which, &c. [*ut ante*, p. 788, *mutatis mutandis*]: TO THE USE of the said [*tenant in tail*] his heirs and assigns for ever, according to the custom of the said manor, by and under the rents, fines, heriots, suits, and services therefor due and of right accustomed.

Testatum.

Memorandum of surrender.

Uses to entail.

[*Signature of tenant in tail.*]

Taken and acknowledged the day and year first-above written by me. } [*Signature of Steward.*]

MEMORANDUM OF PROTECTOR'S CONSENT (*h*).

I the above named [*protector*] as protector of the above-mentioned settlement hereby give my consent to the above surrender.

AS WITNESS, &c.,

[*Signature of protector.*]

Witness.

[*Signature of Witness.*]

(*h*) The protector's consent may be given by a separate deed (see *ante*, Precedent XLV., p. 782), in which case the fact of such consent will be recited in the surrender, as in Precedent XLVI., *ante*, p. 784.

L. *DISENTAILING DEED by* TENANT *in* TAIL *in possession of* EQUITABLE ESTATE *in* COPYHOLDS (*i*).

L. Disentailing Deed of Copyholds.

THIS INDENTURE (*k*), made the —— day of ——, 18—, BETWEEN [*tenant in tail*], of, &c., of the one part, and [*grantee to uses*], of, &c., of the other part: WHEREAS under or by virtue of the will of [*testator*] late of &c., deceased, dated &c., and proved &c., the legal estate in divers messuages, lands, and hereditaments, held by copy of court roll of the manor of ——, in the county of ——, are vested in trustees upon the trusts in the will mentioned, which have all now determined or ceased to take effect, and subject thereto upon trust for the said [*tenant in tail*] in tail, with divers remainders over; NOW THIS INDENTURE WITNESSETH, that for the purpose of barring the equitable estate tail of the said [*tenant in tail*] in the said copyhold premises the said [*tenant in tail*] hereby conveys and disposes of unto the said [*grantee*] all &c. [*parcels*], and all other, if any, the copyhold or customary messuages, lands, and hereditaments, held of the same manor, and to which the said [*tenant in tail*] is entitled for an equitable estate tail in possession, TO HOLD unto the said [*grantee*] and his heirs FREED and discharged from the equitable estate or estates tail of the said [*tenant in tail*], and from all remainders, reversions, estates, rights, interests, and powers to take effect after the determination or in defeazance of such estate or estates tail, TO THE USE of the said [*tenant in tail*], his heirs and assigns according to the custom of the said manor, by and under the rents, fines, heriots, suits, and services therefor due and of right accustomed.

Parties.

Recital of title.

Testatum.

Parcels.

Habendum, freed from the entail.

To the use of tenant in tail in fee.

IN WITNESS, &c.

(*i*) An equitable estate tail in copyholds may be barred, either by a disentailing deed entered on the Court Rolls, or by surrender (3 & 4 Will. 4, c. 74, ss. 50, 53). The disentailing deed must be entered on the Court Rolls within six calendar months after execution: *Honeywood* v. *Foster*, 9 W. R. 855.

(*k*) Stamp, 10*s*.

LI. *DEED by* TENANT *in* TAIL MALE *in* REMAINDER *to create a* BASE FEE.

THIS INDENTURE (*l*), made the —— day of ——, 18—, BETWEEN [*tenant in tail*], of, &c., of the one part; And [*grantee to uses*], of, &c., of the other part: WHEREAS under or by virtue of an indenture of settlement dated &c., and made between [*parties*], the several messuages, lands, and hereditaments described in the same indenture and in the schedules thereto, and hereby granted, now stand limited to the use of [*protector*] and his assigns during his life, with remainder, subject to a jointure rentcharge of £——, thereby limited in favour of [*protector's wife*] and her assigns during her life, if she shall survive the said protector, and also to the sum of £—— and interest, raisable as therein mentioned, for portions for the younger sons and the daughters of the said protector, and to a term of 1000 years thereby limited for securing the same portion moneys, to the use of the said [*tenant in tail*], in tail male with divers remainders over; AND WHEREAS the said [*tenant in tail*] is desirous of barring, as far as may be, all his estates in tail male or in tail under the said settlement and of converting the same into a base fee: NOW THIS INDENTURE WITNESSETH, that the said [*tenant in tail*], hereby grants unto the said [*grantee*], ALL AND SINGULAR the messuages, lands, and hereditaments in the several parishes of ——, and —— in the county of ——, or elsewhere in England or Wales, of or to which he the said [*tenant in tail*] is seised or entitled at law or equity, for any estate in tail male or in tail in remainder under or by virtue of the said settlement, or otherwise howsoever, TO HOLD the same UNTO the said [*grantee*] and his heirs, subject and without prejudice to the said life estate of the said [*protector*] and to all uses and estates limited or created by the said settlement which precede the estate in tail male of the said [*tenant in tail*], and to the powers annexed to such preceding uses and estates, so far as such uses, estates, and powers are now subsisting and capable of taking effect, but FREED and discharged from all estates in tail male or in tail whether at

Parties.

Recitals: of title of tenant in tail;

of desire to create base fee.

Testatum.

Grant.

Habendum, to grantee to use of grantor so as to create base fee.

(*l*) Stamp, 10*s*. This deed must be enrolled.

LI. Deed Creating Base Fee.

law or in equity, therein of the said [*tenant in tail*], To THE USE of the said [*tenant in tail*], his heirs and assigns, to the intent that the same may be converted into a base fee.

IN WITNESS, &c.

LII. *DEED to* ENLARGE *a* BASE FÉE *into an* ESTATE *in* FEE SIMPLE *(to be endorsed on the Deed creating the Base Fee)* (*m*).

Parties.

THIS INDENTURE (*n*), made the —— day of ——, 18—, BETWEEN the within-named [*owner of base fee*], of the one part, and the within-named [*grantee to uses*], of the other part:

Recitals: of death of protector;

WHEREAS the within-named [*protector*] died on the —— day of ——, 18—, leaving the within-mentioned [*wife*] him surviving;

of state of family;

AND WHEREAS there have been issue of the said [*protector*] by his said wife —— children and no more, that is to say, the said [*owner*], his eldest son, and —— younger children, namely [*names*];

of desire to enlarge base fee.

AND WHEREAS the said [*owner*] is desirous of enlarging the base fee into which his estates in tail male and in tail under the within-mentioned settlement were converted by the within-written indenture into an absolute estate in fee simple:

Testatum.

NOW THIS INDENTURE WITNESSETH, that for effectuating the said desire,

Grant.

the said [*owner*] hereby grants and confirms unto the said [*grantee*] and his heirs, ALL AND singular the messuages, lands, and hereditaments expressed to be granted by the within-written indenture,

Habendum, to grantee to use of grantor in fee simple.

TO HOLD the same unto the said [*grantee*] and his heirs, subject to the within-mentioned jointure rent-charge of £——, and to the sum of £—— so raisable for portion moneys as within is mentioned, and to all other, if any, the uses and estates limited or created by the said settlement, which precede the base fee into which the estates in tail male and in tail of the said [*owner*] were converted by the within written indenture, and to any powers

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(*m*) This deed must be enrolled.
(*n*) Stamp, 10*s*.

LII. Deed Enlarging Base Fee.

annexed to such preceding uses or estates, which may respectively be now subsisting or capable of taking effect, BUT FREED AND DISCHARGED from all estates, rights, interests, and powers, to take effect upon the determination or in defeazance of the same base fee, TO THE USE of the said [*owner*], his heirs and assigns, to the intent that such base fee may be enlarged into an absolute estate in fee simple subject as aforesaid.

IN WITNESS, &c.

APPENDIX

TO THE FOREGOING DISSERTATION ON SETTLEMENTS.

Trust Investment Act, 1889.

The Trust Investment Act, 1889.]—Since the Dissertation on "SETTLEMENTS" was in the press the Trustee Investment Act, 1889, has been passed whereby the range of investments permissible to trustees of settled funds (in the absence of express provision to the contrary in the instrument creating the trust) is considerably enlarged. The Act is retrospective, and the statutory powers of investment are in addition to any express powers in the instrument creating the trust: see sect. 6, *infra*. Trustees in exercising the statutory powers must still obtain any consent required by the instrument creating the trust, but otherwise may exercise the powers according to their own discretion: see sect. 5, *infra*. The investment of trust funds in manner permitted by the Act may, however, be restricted by express provision in the instrument creating the trust (see sect. 3, *infra*) as regards any modes of investment which are permitted by this Act, including such as are permitted by any Rule of Court for the time being in force as to the investment of cash under the control of the Court: see *post*, pp. 796, 800.

Who may exercise the statutory powers.

These statutory powers may be exercised by the trustees of Private Acts of Parliament (sect. 9), and by councils of boroughs and counties as regards their loan funds and sinking funds: sect. 7.

The Act is as follows:—

TRUST INVESTMENT ACT, 1889.

(52 & 53 Vict. c. 32).

An Act to amend the Law relating to the Investment of Trust Funds.
[12*th August*, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the Trust Investment Act, 1889.

Extent of Act.

2. This Act shall not extend to Scotland.

Authorised investments.

3. It shall be lawful for a trustee, unless expressly forbidden by

the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following, that is to say;— Trust Investment Act, 1889.

(*a.*) In any of the Parliamentary Stocks or Public Funds or Government Securities of the United Kingdom:

(*b.*) On Real or heritable Securities in Great Britain or Ireland:

(*c.*) In the Stock of the Bank of England or the Bank of Ireland:

(*d.*) In India Three-and-a-half per Cent. Stock and India Three per Cent. Stock, or in any other Capital Stock which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India:

(*e.*) In any securities the interest of which is or shall be guaranteed by Parliament:

(*f.*) In Consolidated Stock created by the Metropolitan Board of Works, or which may at any time hereafter be created by the London County Council, or in Debenture Stock created by the Receiver for the Metropolitan Police District:

(*g.*) In the Debenture or Rentcharge or Guaranteed or Preference Stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

(*h.*) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (*g*) either alone or jointly with any other railway company:

(*i.*) In the Debenture Stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(*j.*) In the "B" Annuities of the Eastern Bengal, the East Indian and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway:

(*k.*) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India:

(*l.*) In the Debenture or Guaranteed or Preference Stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its Ordinary Stock:

Trust Investment Act, 1889.

(*m.*) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough, having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order:

(*n.*) In nominal or inscribed stock issued or to be issued by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such Commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(*o.*) In any of the stocks, funds, or securities, for the time being authorised for the investment of cash under the control or subject to the order of the Court:

And also from time to time to vary any such investment.

Purchase at a premium of redeemable stocks.

4.—(1.) It shall be lawful for a trustee under the powers of this Act to invest in any of the stocks, funds, shares, or securities mentioned or referred to in section three of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2.) Provided that it shall not be lawful for a trustee under the powers of this Act to purchase at a price exceeding its redemption value, any stock mentioned or referred to in sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*), which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or to purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) It shall be lawful for a trustee to retain until redemption any redeemable stock fund or security which may have been purchased in accordance with the powers of this Act.

Discretion of trustees.

5. Every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds.

Application of Act.

6. This Act shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers hereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Investments of sinking fund by local authorities.

7. Where the council of any county or borough or any urban or rural sanitary authority are authorised or required to invest any money for the purpose of a loans fund or a sinking fund, any enactment relating to such investment shall be modified so far as to allow such money to be invested in any of the stocks, funds, shares, or securities in which trustees are authorised by this Act to invest, except that such council or authority shall not by virtue of this section invest in any stocks, funds, shares, or

securities issued or created by themselves, nor in real or heritable securities. Trust Investment Act, 1889.

Provided that it shall not be lawful for any such council or authority to retain any securities which are liable to be redeemed at a fixed time at par or at any other fixed rate and are at a price exceeding their redemption value, unless more than fifteen years will elapse before the time fixed for redemption.

8. The enactments specified in the schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned, but without prejudice to the validity of any act done under any enactment so repealed. Repeal of enactments in schedule.

9. For the purposes of this Act the following terms have the meanings herein-after respectively assigned to them, that is to say :— Interpretation.

The expression "trustee" shall include any executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee.

The expression "stock" shall include fully paid-up shares.

The expression "instrument" shall include a Private Act of Parliament.

The expression "the court" shall mean (except as to Irish trusts) the High Court of Justice in England, and as to Irish trusts, the High Court of Justice in Ireland.

SCHEDULE.

Enactments Repealed. sect. 8.

Session and Chapter.	Title.	Extent of Repeal.
4 & 5 Will. 4, c. 29.	An Act for facilitating the loan of money upon landed securities in Ireland.	The whole Act.
22 & 23 Vict. c. 35.	An Act to further amend the law of property and to relieve trustees.	Section thirty-two.
23 & 24 Vict. c. 38.	An Act to further amend the law of property.	Section eleven.
30 & 31 Vict. c. 132	An Act to remove doubts as to the power of trustees, executors, and administrators to invest trust funds in certain securities, and to declare and amend the law relating to such investments.	The whole Act.
34 & 35 Vict. c. 47.	The Metropolitan Board of Works (Loans) Act, 1871.	Section thirteen.

Trust Investment Act, 1889.

Observations on the Provisions of the Act.]—The modes of investment specified in sect. 3, sub-sects. (*a*), (*b*), (*c*), (*d*), (*e*), and (*o*), were permitted by former Acts relating to investment of trust funds, and have been discussed in the foregoing Dissertation, see *ante*, pp. 255 *et seq.* The following investments now, however, for the first time, receive statutory sanction by virtue of that section, and require some notice in this place :—

New statutory modes of investment.

Sect. 3.

(*f.*) *Stock of the Metropolitan Board of Works or London County Council, and Debenture Stock created by the Receiver for the Metropolitan Police District.*

London County Council Stock.

Investment of trust funds in Metropolitan Board of Works Stock was permitted by the Metropolitan Board of Works (Loans) Act, 1871 (see *ante*, p. 262), which Act is now repealed. By sect. 40 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the powers, duties, and liabilities of the Metropolitan Board of Works are transferred to the London County Council: sub-sect. 8; and by sub-sect. 9 it is enacted that if the London County Council borrow for the purposes of this Act, they shall borrow in accordance with the Acts relating to the Metropolitan Board of Works.

Debenture Stock of Metropolitan Police Receiver.

By the stats. 49 Vict. c. 22, and 50 & 51 Vict. c. 45, the Receiver for the Metropolitan Police District is empowered to borrow for certain specified purposes "on the security of the Metropolitan Police Fund and of the property vested in the Police Receiver or any part or parts thereof" to the extent of 500,000*l.*; and a lender is not to be concerned to see or inquire for what purpose any money is borrowed under these Acts.

Sect. 3.

Railway debentures. &c.

(*g.*) *Debenture, or Rentcharge, or Guaranteed or Preference Stock of any railway company in Great Britain or Ireland, having during each of the ten years previous to the investment paid a dividend of not less than* 3 *per cent. per annum on its ordinary stock.*

This mode of investment is permitted by the Rule of Court of November, 1888, without any requirement as to the rate of dividend which must have been paid during the ten years such as is required by the statute.

Sect. 3.

(*h.*) *Stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than* 200 *years at a fixed rental to any such railway company as is mentioned in sub-sect.* (*g*), *either alone or jointly with any other railway company.*

This mode of investment of trust funds is now permitted by statute for the first time. It must of course be carefully ascertained in making any particular investment that the Special Act authorises leases at fixed rentals, and that the undertaking is so leased, and that the investment in every respect satisfies the statutory conditions. For a list of railway companies which apparently satisfy these conditions, see Ellis' "Trustees' Guide to Investments," 3rd ed., pp. 102, 103.

Indian railway debenture stock.

(*i.*) *Debenture Stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India.*

Such investments are permitted by the Rule of 1888, provided

the stock is not redeemable for at least fifteen years from the date of investment. This restriction is now removed as regards the investment of trust funds not under the control of the Court, and by sect. 4 of the Act as to all investments permitted by sect. 3, provided that as regards those specified in sub-sects. (*g*), (*i*), (*k*), (*l*), and (*m*), but not (*j*), if the stock is liable to be redeemed within fifteen years, a trustee must not purchase at a price above the rate of redemption, but if the stock is redeemable after that period he must not purchase at a price exceeding 15 per cent. above such rate. **Trust Investment Act, 1889.**

(*j*) *B. Annuities of specified Indian railways, and other like guaranteed annuities.* Indian railway annuities.

These are now authorised by statute for the first time.

(*k.*) *Guaranteed Stock of any Indian railway company.* Indian railway guaranteed stocks.

This mode of investment was permitted by the Rule of Court with the restriction above referred to, and which is now removed subject to the qualifications above mentioned.

(*l.*) *Debenture or Guaranteed or Preference Stock of any water company in Great Britain or Ireland, incorporated by special Act or Royal Charter, and having during each of the ten years previous to investment paid a dividend of not less than 5 per cent. on ordinary capital.* Stock of water companies.

These are now authorised by statute for the first time.

(*m.*) *Nominal or Inscribed Stock of municipal corporations and county councils.* Municipal stocks, &c.

Compare the Rule of 1888, *ante*, p. 259. Nominal stock is apparently stock in respect of which a stock certificate to bearer has not been issued: see the Local Loans Act, 1875 (38 & 39 Vict. c. 83), sect. 6.

(*n.*) *Nominal or Inscribed Stock of incorporated Water Commissioners.* Stock of water commissioners.

It must of course be ascertained previously to making an investment that the requirements of this sub-section are satisfied.

The effect of the repeal by the recent Act of the several enactments, as modifying the observations in the foregoing Dissertation remains to be noticed. Repeals.

(i.) *Stat.* 4 *&* 5 *Will.* 4, *c.* 29.—This Act provided that trustees, authorised to lend money on real securities in England, Wales, or Great Britain, or to sell real or leasehold estates or other property and to invest the proceeds in real securities, might lend on real securities in Ireland, except in any case where such mode of investment is expressly forbidden by the instrument creating the trust.

(ii.) *Stat.* 22 *&* 23 *Vict. c.* 35, *sect.* 32.—This section (see *ante*, p. 256) extended the power to invest real securities in any part of the United Kingdom to all trustees whether authorised to invest on real securities or not, unless forbidden by the instrument of trust.

It will, however, be observed that the recent Act by sect. 3, sub-sect. (*b*), virtually re-enacts the two enactments above referred to by permitting the investment of trust funds in real securities in Great Britain *or Ireland* unless expressly prohibited. If, therefore, it is not intended that the trustees of a settlement should

Trust Investment Act, 1889.

not be authorised to invest in Irish real securities, express prohibition words must be still inserted in the settlement.

(iii.) *Stat.* 23 *&* 24 *Vict. c.* 38, *sect.* 11.—This is a most important repeal; see the section set out *ante*, p. 257. The effect of the repealed section, as interpreted by the decision in *Re Wedderburn's Trusts*, 9 Ch. D. 112 (*ante*, p. 260), was that trustees had power to adopt any investments in or upon which, by virtue of any order for the time being in force, cash under the control of the Court might be invested notwithstanding any restrictive or prohibitive words in the settlement. By sect. 3, sub-sect. (*o*), of the recent Act, trustees are authorised to invest in any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control of the Court; but this mode, no less than any of the other modes of investment authorised by sect. 3 may be expressly forbidden by the instrument creating the trust. It may be noticed that the statutory authority does not extend to any *shares* such as are by the Rule of Court now in force (*ante*, p. 258) authorised for investment of cash under the control of the Court.

(iv.) *Stat.* 30 *&* 31 *Vict. c.* 132.—This Act (*ante*, p. 256) extended the permission given by the stat. 22 & 23 Vict. c. 35, to invest in East India Stock so as to authorise investment in any such stock which might be created by any future Acts; and it also authorised the investment of trust funds generally in any securities guaranteed by Parliament. These repealed provisions are virtually re-enacted by sect. 3, sub-sects. (*d*) and (*e*), of the recent Act.

General remarks.

In conclusion, it is to be observed that although this Act considerably enlarges the choice of investments open to trustees, it imposes on the exercise of the statutory powers, in the case of investments now for the first time obtaining statutory sanction, somewhat stringent conditions. It will therefore be incumbent on trustees, who propose to adopt such modes of investment, to be particularly careful to obtain and preserve sufficient evidence that the statutory requirements were strictly complied with at the time of investment, if they would ensure themselves against the risk of being called to account for breach of trust in respect of such investments.

SPECIAL DEEDS
AND OTHER INSTRUMENTS.

PRECEDENTS.

SPECIAL INSTRUMENTS.

I. *AGREEMENT for the* PURCHASE *on the* HIRE SYSTEM *of* FURNITURE, *&c., in an* HOTEL (*a*).

THIS AGREEMENT (*b*), made the —— day of ——, 18—, BETWEEN [*owner of furniture*], of, &c. (hereinafter called the owner), of the one part, and [*hotel-keeper*], of, &c. (hereinafter called the hirer), of the other part, WITNESSETH, and the parties hereto mutually agree as follows, that is to say :— Parties.

1. The owner agrees to let to the hirer, and the hirer agrees to take on hire from the owner, with a view to the ultimate purchase thereof as hereinafter mentioned, the household furniture, removeable fixtures, plate, plant, utensils, and all other things used by the owner in the business of an hotel-keeper hitherto carried on by him in and about the —— Hotel, and henceforth to be carried on there by the hirer, and specified and described in the schedule hereunder written, and hereinafter referred to as "the said effects." Agreement for hire of furniture and effects.

2. The said effects have been ascertained and shall be taken to be of the value of £——, which is to be the sum so to be paid by the instalments and in the manner hereinafter mentioned, by the hirer to the owner as and for the hire of the said effects. Value of effects to be deemed to be £——.

3. The said hire instalments shall be paid as follows: on the signing hereof £——, on the —— day of ——, 18—, Payment of purchase money by instalments.

(*a*) The custom of hotel-keepers holding furniture, &c., on hire being well established, the effects, on the bankruptcy of the hirer, will not be in his order and disposition within sect. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) : *Crawcour* v. *Salter*, 18 Ch. D. 30 ; *Ex parte Turquand, Re Parker*, 14 Q. B. D. 636. *Secus*, as regards private householders : see *Ex parte Brooks*, 23 Ch. D. 261. Such an agreement will not require registration as a bill of sale : *Ex parte Crawcour*, 9 Ch. D. 419 ; see also *Re Davis, Ex parte Rawlings*, 22 Q. B. D. 193. See further on this subject, *ante*, sub tit. "AGREEMENTS," Vol. I., notes to Precedent XLVIII., pp. 631 *et seq.*

(*b*) Stamp, 10*s*.

I. Agreement for Hire of Hotel Furniture.

£——, on the —— day of ——, 18—, £——, and in every succeeding year, by half-yearly instalments of £——, payable on the —— day of —— and the —— day of —— in every year, of which the first half-yearly payment shall be made on the —— day of ——, 18—, and which half-yearly payment shall continue until the whole of the said sum of £—— shall have been paid.

Instalments may be paid by anticipation.

4. The hirer may at any time, provided he shall have paid off all instalments previously due, pay all or any of the instalments, and in case he shall exercise this option, may deduct discount at the rate of —— per cent. in respect of any anticipative payments.

Repairs and insurance.

5. During the hiring, the hirer shall take all proper care of the said effects, and shall keep the same in a good condition and state of repair, and will keep insured in their full value such part of the said effects as are insurable, and will at all times, on demand, produce to the owner the policy of insurance and receipts for premiums, and in default the owner may make and keep up such insurance, and all monies expended by him for that purpose shall be repaid to him by the hirer on demand, with interest at the rate of —— per cent. per annum from the date of expenditure, and the hirer shall not, without the consent of the owner, remove or, except in the ordinary course of business, part with the possession of the said effects or any of them, or assign, transfer, underlet, or lend the same to any person or persons whomsoever.

Power for owner to seize effects on defaults of hirer.

6. In case the hirer shall during the continuance of this agreement do or suffer any of the following acts or things, namely, either

(a.) Fail to pay any of the hiring instalments within twenty-one days after the same shall have become due;

(b.) Become bankrupt or compound with his creditors;

(c.) Execute a bill of sale;

(d.) Do or suffer any act or thing whereby or in consequence of which the said effects or any of them may be distrained, seized, or taken in execution under legal process;

(e.) Or break or fail to perform or observe any condition on his part herein contained:

then and in such cases, the owner may enter into any house or place where the said effects or any of them may then be, and seize, remove, and retake possession of the said effects or

any part thereof, and all hiring instalments previously paid by the hirer shall be absolutely forfeited to the owner, but the hirer shall not be liable for any future instalments.

Negotiable instruments to be deposited by way of collateral security.

7. On the signing hereof the hirer shall deposit with the owner promissory notes for the total amount of hire instalments to be paid hereunder, such promissory notes being given as collateral security and without prejudice to the title of the owner to the said effects or to any rights reserved to them by this agreement and subject to the stipulation that in case of the said effects being seized and removed by the owner under the provisions hereof, the said promissory notes or so many of them as shall then be current, shall after such seizure and removal be given up on demand to the hirer, and shall from and after such seizure or removal become absolutely void (*c*).

On payment of entire purchase money, effects to become property of hirer.

8. Upon payment by the hirer to the owner of the full sum of £—— by the instalments aforesaid, or by anticipation as hereinbefore provided, this agreement shall be deemed

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(*c*) The owners sometimes insist on having bills or notes for the amount of the hire instalments, so as to arm themselves with a summary remedy in the event of the furniture being destroyed or removed, or of their being for any other reason unable to get it back. But it must be borne in mind, that to negotiate or sue upon the notes might have the effect, as between owners and hirer, of converting the transaction into a sale and purchase, instead of a hiring (see the observation of *James*, L.J., in *Ex parte Crawcour, Re Robertson*, 9 Ch. D. 423) or, at least, might preclude the owners from setting up the agreement as a hiring contract only. But it is submitted there would be no objection to any dealing with the notes which would not prevent the owners from fulfilling their part of the hiring agreement, nor put the hirer in any worse position than he would have been in if such dealing had not taken place. Thus, in case a furnishing company had taken bills of exchange, and were desirous of discounting them with their own bankers for their own temporary convenience, they being fully prepared out of their own monies to retire the bills at maturity, it is conceived that they might negotiate the bills, if they could get an undertaking from the bank not to rediscount them with third parties. For if, notwithstanding the undertaking, the bills were to get into the hands of third parties, and be sued on, though the owners (having put it out of their power to fulfil the terms of the hiring agreement) might be unable to retake possession of their furniture, and would in addition be liable to the holders of the bills, yet they would have a remedy over against the bank for breach of the undertaking. It may be doubted, however, whether any bank would give such an undertaking.

I. Agreement for Hire of Hotel Furniture.

completed and shall thenceforth cease and determine, and the said effects shall become and be the property of the hirer, but until the whole of the said sum shall have been paid, the said effects shall remain the sole and absolute property of the owner, and in the meantime are only let on hire to the hirer.

9. The expressions "owner" and "hirer" herein used include executors and administrators of the parties hereto respectively.

As witness, &c.

The Schedule above referred to.

II. *DEED OF ARRANGEMENT between* Executors *of a Deceased Person and his late* Partners *for* Use *of his* Name *in carrying on the* Business.

Parties.

THIS INDENTURE (*d*), made the —— day of ——, 18—, Between [*executors*], of, &c., of the one part, and [*partners*], of, &c. (co-partners in the business of [*chemists*] at, &c., under the name of —— & Co.), of the other part:

Recitals: of arrangement as to retirement of deceased from firm and new partnership between the other members;

Whereas, by an agreement dated the —— day of ——, and made between [*parties*], &c., [*recite agreement by deceased partner to retire from partnership in consideration of a gross sum and of a life annuity secured by bond; also deed of dissolution of partnership; and articles of partnership between the other members of the old firm, whereby they agreed with deceased to pay him a further annuity of* 100*l. for permission to continue to use his name in carrying on the business during his life*]; And whereas the said [*deceased partner*] died on the —— day of ——, 18—, having by his will, dated, &c., and proved, &c., appointed the said [*executors*] to be the executors thereof; And whereas, upon the death of the said [*deceased partner*], his said [*executors*] required the said [*partners*] to discontinue the use of the name of the said [*deceased partner*] in the style of the said firm as —— & Co., and thereupon it was agreed by and between the said parties hereto, that the said [*partners*] should pay to the said

of death of retired partner and appointment of executors; of demand by executors to discontinue use of name of deceased partner; and fresh arrangement as to uses thereof.

(*d*) Stamp, 10*s*.

II. Deed of Arrangement as to Use of Name in Business

[*executors*] the sum of £——, and that, in consideration thereof, the said [*partners*], and their successors in the said business, should be at liberty to use the name of the said [*deceased partner*] in the style of the said firm, but that the said [*partners*], and their successors for the time being, should indemnify the estate of the said [*testator*] against any liability on account of such user of his name: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— paid to the said [*executors*] by the said [*partners*] (the receipt whereof the said [*executors*] hereby acknowledge), and in consideration of the indemnity hereinafter contained, they the said [*executors*], as such executors as aforesaid, do and each of them doth hereby grant unto the said [*partners*], their successors or assigns for the time being in the said business, full and free liberty to use the name of the said [*deceased partner*] in the style of the firm now carrying on, or of such firm as may be for the time being carrying on the said business: AND the said [*partners*] do hereby, and each and every of them doth hereby severally covenant with the said [*executors*], that they the said [*partners*], or some or one of them, their, or some or one of their heirs, executors, or administrators, will from time to time, and at all times hereafter, keep indemnified the said [*executors*], and each of them, their, his, and her estate and effects, and the estate and effects of the said [*testator*], deceased, from and against all actions, suits, damages, claims, demands, costs, charges, and expenses, which may be incurred or sustained by reason or in consequence of the use of the name of the said [*testator*] in the style of the firm now carrying on, or of such firm as may for the time being carry on the said business: PROVIDED ALWAYS, and it is hereby agreed and declared, that nothing herein contained shall subject the said [*executors*], or any of them, to any personal liability, and further that no successor in the said business shall be at liberty to use the name of the said [*deceased partner*], unless such successor shall upon being required by notice in writing so to do, execute the same or the like indemnity to the executors or executor, administrators or administrator, for the time being of the said [*testator*], deceased, as is hereinbefore contained on the part of the said [*partners*].

Testatum.

Grant of licence to continue use of name of deceased in style of firm.

Covenant by grantees to indemnify executors in respect of use of name.

Proviso as to indemnity by successors.

IN WITNESS, &c.

III. *ASSENT by an* Executor *to a* Bequest *of* Leaseholds (*e*).

Exordium.

Assent.

KNOW ALL MEN BY THESE PRESENTS that I [*executor*], of, &c., being the executor of the will of [*testator*]

Assent necessary to complete legatee's title.

(*e*) Although a testator bequeath his personal estate, either specifically or by way of residuary gift, yet the legal interest of the whole is vested in the executor by operation of law. However, in equity the executor takes the personal estate as a trustee, in relation to the persons beneficially entitled. But nothing passes to the legatee, nor can a legatee take anything bequeathed to him, without the executor's assent, either express or implied : Co. Litt. 111a ; Wentw. Off. Ex. 69 ; *Lampet's case*, 10 Rep., 52 b ; *Bolles* v. *Nyseham*, Dyer, 254 b ; *Northey* v. *Northey*, 2 Atk. 77. And in the meantime, until assent, the right of disposition is in the executor, and he may make a good title even against the legatee, except the sale be fraudulent. And so far is this principle carried that a specific legatee is not a necessary party to a suit respecting the property bequeathed, if the executor has not assented to the bequest : *Const* v. *Harris*, Turn. & R., 514. Until assent the legatee has, however, an inchoate right to his legacy, which is assignable and transmissible to his personal representatives : Wentw. Off. Ex. 69. And he or his assignees or representatives can compel the executor to give his assent, if he refuse without good cause : Com. Dig. *Administration* (c. 8).

Whether assent is necessary to release of debts by testator's will.

It seems to be the better opinion that the executor's assent is necessary to a release of a debt by the testator's will. It has, indeed, been contended that the debtor has the debt already, and all that the testator's will gives him is a right of retainer, which is not that sort of property that vests in the executor, and passes by his assent. But this seems to be a begging of the question, which is whether the executor's right of action, which it may be his duty to exercise in favour of the creditors, can pass from him without his assent. The mere possession of the thing bequeathed or released cannot give a title against the executor, for it is clear that if a testator had bequeathed a specific chattel in A.'s custody to A., the executor might, before the assent, recover the chattel from A. in trover : Bac. Abr. Executors (L. 3) ; Com. Dig. *Administration* (c. 5) ; *Mead* v. *Lord Orrery*, 3 Atk., 239. Accordingly, it has been held that such a direction in a will is not in strictness a release, but a legacy, and the debt must be assets, and liable to pay the debts of the testator : *Rider* v. *Wager*, 2 P. Wms., 331 ; *Elliott* v. *Davenport*, 1 P. Wms., 83 ; *Sibthorp* v. *Moxon*, 3 Atk., 581 ; 1 Ves. sen., 50 ; and legacy duty is payable on the debt : *Izon* v. *Butler*, 2 Price, 41 ; *Att.-Gen.* v. *Holbrook*, 3 Y. & J. 114. See *post*, Vol. VII., 228, 775 note.

Effect of assent.

After assent, the legal title to a term of years bequeathed or in any specific legacy vests in the legatee : *Adams* v. *Pierce*, 3 P. Wms. 12 ; and the legatee may accordingly bring an action against the executor, or any other person, to recover its posses-

late of, &c., deceased, dated the —— day of ——, 18—, and proved on the —— day of ——, 18—, in the Principal

III. Assent by Executor.

sion: *Bastard* v. *Stukeley*, 2 Lev. 209; *Williams* v. *Lee*, 3 Atk. 223; *Doe* v. *Guy*, 3 East, 120.

Assent to one having a partial interest is an assent to the others.

Where a legacy of a term of years or of any chattel is limited to several persons by way of remainders, the executor's assent to the first taker will be considered an assent to those who are to succeed; And *e converso* his assent to one of the subsequent takers will enure to the benefit of those who take prior interests in the property bequeathed; for the several interests of the legatees constitute in the whole but one estate. And an assent to a bequest is an assent to a condition or contingency annexed to the bequest. So if a term of years were devised to A. for life, or for so long as A. should continue unmarried, with remainder to B., and the executor assented to the interest of A., such assent would extend to B., and vest also his interest; in like manner, if the assent had been given to B., it would have enured to A.: Com. Dig. *Administration* (c. 6); Wentw. Off. Ex. 426; *Welchden* v. *Elkington*, Plowd. 519; *Adams* v. *Pierce*, 3 P. Wms. 12; *Foley* v. *Burnel*, 34; *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. 81. So if a term be bequeathed to the executor for life, he paying £50 to A., remainder to B., proof of payment by the executor of £50 to A., will be a sufficient assent to the bequest in remainder to B.: *Young* v. *Holmes*, 1 Str. 70. But it seems that an entry by an executor legatee for life is not necessarily an assent to the bequest in remainder, if an executor, in his manner of administering the property, does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent to the legacy: per *Gibbs*, C.J., in *Doe* v. *Sturges*, 7 Taunt. 217.

Relation of assent.

The assent of an executor relates back to the testator's death: Wentw. Off. Ex. 445, 446; *Saunder's Case*, 5 Rep. 12 b; and will confirm any intermediate dealings by the legatee with the subject-matter of the bequest: Toller, 311; Winson Exors.

Assent to bequests of stock.

It was formerly supposed that a will duly attested under the several Acts for creating different kinds of public stocks, would pass stock to a legatee of its own force without the assent of the executor, in the same manner as freeholds pass by a devise; and the Bank of England for some time acted on this assumption, which, however, was clearly erroneous, as the executor having the legal right to all the testator's assets for payment of debts, had alone the right to call upon the Bank to transfer the stock; and the legatee, though the bequest gave him a right to the assent of the executor, if the assets should be sufficient, could not perfect his title and complete his possession without the transfer into his name, with executor's assent, of the stock in the Bank books: see *Pearson* v. *Bank of England*, 2 Cox, 175; *Humberstone* v. *Chase*, 2 Y. & C. 209. And now by the stat. 8 & 9 Vict. c. 91, s. 1, it is provided that all stock standing in the name of any deceased person shall be assigned and transferred by the executors

III. Assent by Executor.

Registry of the Probate Division of the High Court of Justice, hereby declare that the funeral and testamentary

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or administrators of the deceased, notwithstanding any specific bequest thereof.

Assent not necessary to devise of real estate.

The doctrine of assent by an executor does not extend to a devise of an estate in fee, nor to any estate carved out of the fee by the testator's will. Where a man, seised of an estate in fee, devises the same in fee, in tail, or for life, the devisee may enter without the assent of the executor: Co. Litt. 111 a; *Bunker* v. *Cook*, 11 Mod. 126. It does not seem quite clear whether the doctrine extends to an estate *pur autre vie* not limited to heirs and specifically bequeathed: by the stat. 1 Vict. c. 26, s. 6, it is enacted that an estate *pur autre vie, if no disposition shall be made thereof by will*, and if there shall be no special occupant, shall devolve to the executor or administrator of the grantee, and shall accordingly be assets in his hands, and shall go in the same manner as personal estate; but it seems doubtful whether where an estate *pur autre vie* is specifically given by will, the mere assent of the executor will vest the legal estate in the specific legatee (though it apparently would in the case of a residuary legatee or next of kin), or whether there should not be a formal conveyance of the land from the executor.

By whom assent may be given; by one of several executors.

When there are two or more executors, the assent of any one or more is sufficient: Wentw. Off. Ex.; *Holkirk* v. *Holkirk*, 4 Madd. 51; *Worthington* v. *Evans*, 1 S. & St. 165; and in the case of the death of one of several executors, the power survives: *Flanders* v. *Clark*, 3 Atk. 510. And if a legacy be given to one executor, he may assent to the bequest without the concurrence of his co-executors, and retain the legacy: *Townson* v. *Tickell*, 3 B. & Al. 40; and according to Perkins even before probate or administration: Perk. s. 572.

Assent by married woman.

It seems anciently to have been doubted whether a married woman, appointed executrix, was competent to assent to a legacy without the concurrence of her husband; but in *Russel's Case*, 5 Rep. 276, it was held that she was incapable of releasing a legacy without her husband; and in *Cookes* v. *Bellamy*, 1 Sid. 188, the Court considered it settled that an assent by a wife without her husband's permission was nugatory. It seems clear, however, that this difficulty is removed by the operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). By sect. 1 of that Act "a married woman is rendered capable of entering into any contract . . . . . in all respects as if she were a *feme sole*;" and by sect. 24, the word "contract" in this Act is made to include the acceptance of the office of executrix or administratrix. It seems necessarily to follow that as she can accept these offices as a *feme sole*, she must be capable of acting therein in the performance of her duties as a *feme sole*, and can accordingly release debts owing to the testator's estate, or assent to legacies bequeathed by his will without her husband's concurrence.

Assent by administrator *durante minore ætate.*

An infant executor cannot legally give his assent to a legacy before he arrives at full age, but his administrator *durante minore*

expenses and debts of the said [*testator*] and all the specific and pecuniary legacies bequeathed by his said will, have to

III. Assent by Executor.

ætate may assent on his behalf, provided that the assets are sufficient to pay debts, &c. : Bac. Abr. *Executors* (B 1), *Prince's Case*, 5 Rep., 29 b. ; *Anon.* Freem., 288. In *Prince's Case* it was held that if an infant executrix married a husband of full age the administration would cease, but now, it seems, the administration would continue, notwithstanding the marriage : see *Jones* v. *Lord Strafford*, 3 P. Wms., 88.

When assent to a legacy may be given.

Assent before probate.

An executor may assent to or pay a legacy, or assign a term, or release an action or debt, before probate : Wentw. Off. Ex. 82 ; *Graysbrook* v. *Fox*, Plowd. 281 ; *Wankford* v. *Wankford*, Salk. 306 ; *Middleton's Case*, 5 Rep. 28a ; *Hudson* v. *Hudson*, 1 Atk. 461 ; *Wills* v. *Rich*, 2 Atk. 285 ; *Rogers* v. *James*, 7 Taunt. 147. And the death of the executor before probate will not affect the validity of any of these acts, although until the will is proved by an executor, or by an administrator obtaining administration *cum testamento annexo*, it cannot be given in evidence : *Anon.* Freem. 28, pl. 22 b ; *R.* v. *Stone*, 6 T. R. 298 ; *Pinney* v. *Pinney*, 3 B. & Cr. 335 ; *Brazier* v. *Hudson*, 8 Sim. 67 ; *Fenton* v. *Clegg*, 9 Exch. 680.

Assent before debts are paid.

Executors should not assent to any specific legacy whether of a term of years or of an estate *pur autre vie* devolving on them (as to which see *ante*, Vol. V., p. 403, note (*z*)), or of chattels, until they are satisfied that the assets are sufficient to pay the testator's debts, without compelling the specific legatees to abate in proportion among themselves : *Duke of Devon* v. *Atkins*, 2 P. Wms. 383 : Shep. Touch. 455. For although after assent to a specific bequest, the legatee will be compellable to refund in favour of creditors where the assets are deficient (*Hodges* v. *Waddington*, 2 Vent. 360 ; *Gillespie* v. *Alexander*, 3 Russ. 136), yet the executor himself, after assent, cannot avoid the assent, or recover the legacy unless a deficiency be afterwards created by debts which were unknown until after his assent : *Davis* v. *Davis*, 8 Vin. Abr. 423, pl. 35 ; *Noel* v. *Robinson*, 2 Ventr. 358 ; *Orr* v. *Kaines*, 2 Ves. sen. 194 ; *Coppin* v. *Coppin*, 2 P. Wms. 296 ; or where the legacy is paid by mistake : see *Livesey* v. *Livesey*, 3 Russ. 287. And if, after assent to a bequest of a term of years, the legatee sell *bonâ fide* to a third person, the sale will defeat the claims of creditors : *Chamberlain* v. *Chamberlain*, 1 Ch. Ca. 257.

As to revocable and conditional assents.

As a rule, and except in cases such as have been noticed above, of unexpected claims of creditors, or payment of legacies by mistake, an assent once given by an executor cannot be afterwards retracted ; and notwithstanding a subsequent dissent the legatee has a right to take his legacy : Wentw. Off. Ex. 415 ; *Mead v. Lord Orrery*, 3 Atk. 238 ; *Foley v. Burnel*, 4 Br. P. C. 34. Nor can an assent be given conditionally, except the condition be precedent ; nor subject to revocation ; for in either case the assent would be considered good and absolute : Wentw. Off. Ex. 429. Thus if the bequest were of goods, and the executor delivered them to the legatee to be redelivered, in whole or in part, at a subsequent

III. Assent of Executor.

the best of my knowledge and belief been fully paid or satisfied, and I hereby assent to the bequest made by the said will of

Parcels.

ALL THAT the dwelling-house and garden, situate, &c., and comprised in an indenture of lease dated, &c., and made between [*lessor*], of, &c., of the one part, and [*lessee*], of, &c., of the other part, and thereby demised unto the said [*lessee*], his executors, administrators and assigns from the —— day of ——, 18—, for the term of — years, at the yearly rent of £——, and subject to the covenants and conditions therein contained.

IN WITNESS, &c.

IV. *DEED of CONFIRMATION by an* HEIR-AT-LAW *of an Estate mentioned to be devised by a Will unattested* (*g*).

Parties.

THIS INDENTURE, made &c., BETWEEN [*heir*], of, &c., of the one part; and [*devisee*], of, &c., of the other part:

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period, the delivery would be a good assent, and the condition of redelivery would be void: *Colbourne v. Mixstone*, 1 Leon, 130; *Westwick v. Wyers*, 4 Rep. 28 b.; Com. Dig. *Administration* (c. 8).

What constitutes assent.

The assent of an executor to a legacy is only a perfecting act, for it is the will of the testator which gives the interest to the legatee, and therefore the law does not prescribe any particular form in which the assent is to be given. Thus, the assent may be either given by the executor in express terms, either in writing or by parol, or it may be inferred from any expression or act of the executor which shows his concurrence or agreement in the taking of the legacy: Wentw. Off. Ex. 414; *Noell v. Robinson*, 1 Vern. 94; see *Wilson* v. *Rhodes*, 8 Ch. D. 777. It is, however, always advisable to have the assent in writing on account of the difficulty necessarily attending the proof of parol assent. But an assignment by the executor is not requisite: nor is it necessary that the assent should be given by deed: as an assent, a mere writing under hand is as effectual as a deed. If the

Stamp.

assent be given by deed, a stamp of 10*s.* will be required, otherwise no stamp is necessary. As to the evidence of assent by executors, see *ante*, sub tit. "ABSTRACTS," Vol. I., pp. 175 *et seq.* And see further as to assents of executors generally, Williams on Exors. (8th ed.) Vol. II., pp. 1378 *et seq.*

Confirmation.

(*g*) A confirmation is an approbation of, or assent to, an estate already created; by which the confirmor strengthens and gives

IV. Confirmation of Unattested Will to Devisee in Fee.

WHEREAS [*testator*], late of, &c., duly made and signed his will, bearing date the —— day of ——, 18—, and thereby

validity to it, as far as it is in his power. It has this operation only with respect to estates *voidable* or defeasible; but it has no operation upon estates which are absolutely void: Butl. n. Co. Litt. 295, b (1).

Recitals: of a will which was

The usual operative words are, "given, granted, ratified, approved, and confirmed:" 2 Bl. Com. 325. However, either the three latter (Litt. s. 515), or either of the two former alone, will operate as a confirmation: Litt. s. 531. And such additional words may be mixed with the words of confirmation as may increase or enlarge the estate; but that is effected by the force of such additional words, and, strictly speaking, is foreign to the confirmation: Gilb. Ten. 75. A deed intended to operate as a bargain and sale, but failing as such for want of consideration, has been held to enure as a confirmation: *Osborne* v. *Churchman*, Cro. Jac. 127. The word *dedi* or *concessi* will operate as a confirmation: Litt. s. 531. And the word *confirm* may operate by way of grant or release: Litt. ss. 533, 549.

Operative words.

A confirmation to a tenant of freehold of inheritance cannot be so worded as to have a less operation than that of confirming his whole estate; consequently, a confirmation to such a tenant, either of the lands, or of his estate in them, for any term or period, is a confirmation of his whole fee: 5 Rep. 81; Co. Litt. 297 a. And a confirmation may be as to part of the land: Co. Litt. 297 a. It is otherwise in the case of a term for years; a confirmation may be made of part of the term only. The reason of this difference is, that an estate of freehold or of inheritance is considered as integral and indivisible (*Ford's Case*, 5 Rep. 81 a; Cr. El. 447, 472), but as years are several, the term which is composed of them is necessary fractional and divisible, and may consequently be confirmed in part only, by using proper expressions for this purpose. If a person confirms the estate of the tenant for years for part of the term, as the word estate signifies all the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary: Butl. n. Co. Litt. 267 a (1).

Effect of a confirmation.

A lease by a tenant for life beyond the terms of his power is void; and acceptance of rent by the remainderman is no confirmation, though it may create a tenancy: *Finch* v. *Throgmorton*, Cr. El. 221; *Doe* d. *Martin* v. *Walls*, 7 T. R. 83; *Doe* d. *Simpson* v. *Butcher*, Doug. 50. But leases by tenants in tail are voidable only: *Earl of Bedford's Case*, 7 Rep. 8. A lease for ninety-nine years by tenant in tail was held to have been confirmed as against the next heir in tail by his receipt of rent: *Doe* d. *Southouse* v. *Jenkins*, 3 Moo. & P. 59. And a remainderman may by deed confirm a lease for years by the tenant for life during the life of the particular tenant: Litt. s. 516. But quære, whether this is properly

What estates may be confirmed.

IV. Confirmation of Unattested Will to Devisee in Fee.

after bequeathing several pecuniary legacies and annuities, gave and bequeathed to his brother the said [*heir*], an annuity of £100: And the said [*testator*] thereby gave his freehold estate in —— to his nephew the said [*devisee*]: And the said [*testator*] thereby appointed the said [*devisee*], and [T. K.]

signed, but not published in the presence of witnesses;

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a confirmation, see Gilb. Ten. 75; 9 Rep. 142. As to what leases are void, and what voidable only, *vide ante*, Vol. III., tit. "LEASES," Chap. I. As to waiver of forfeiture under a condition, *vide* Vol. III., pp. 113, 211, 253. These are instances of confirmation *implied by law.*

If there be nothing more than a confirmation of title, there cannot be any uses or trusts (3 Pres. Abs. 119), because no seisin passes.

So, as there must be a particular estate to support even a vested remainder, which precedent estate must be formed at the same time with the remainder (Plow. 25), therefore, if a reversioner in fee *confirm* the estate of a lessee for years, and limit the remainder, it is void; because the term was antecedent to the remainder, and not created with it by the same instrument at the same time. So, if a reversioner *confirm* the estate of tenant for life, the remainder over, such remainder is void; for no change is made in the particular estate: Dr. & Stud. Dial. 11, c. 20. (It is remarkable that this passage of the excellent authors is cited so early as by Chief Justice *Brooke*, Abr. *Done and Remainder*, pl. 45; *Estates*, pl. 80). But if the particular estate existing be by *confirmation enlarged*, as if a reversioner confirm the estate *pur autre vie* for the tenant's own life, or confirm the estate of tenant for life *in tail*, the remainder over, such remainder is good: 2 Roll. Abr. 415, pl. 8, 18 Vin. Ab. 382.

Confirmations at the present day.

Modern deeds called confirmations are often not, strictly speaking, confirmations; for, being generally by way of conveyance, they have a more extensive operation than a simple confirmation at common law.

Stamp.

Where the deed does not operate as a confirmation at common law, it of course takes effect as an original disposition for the purpose, and must be stamped accordingly. But where the transaction is a conveyance or a sale, the previous conveyance of the equitable interest is the principal instrument, and if this is duly stamped no *ad valorem* stamp on the deed of confirmation is requisite, but only an ordinary deed stamp of 10*s*.

Suggestion as to deeds of confirmation.

Where a deed is executed by an heir-at-law, in order to confirm a devise which is suspected to be invalid, it ought always to be made by some assurance sufficient to pass the inheritance between third persons, and not by way of confirmation or release merely, which would be inoperative, except as between the parties themselves.

By whatever method a confirmation is effected, if there be any *suppressio veri aut suggestio falsi* (3 Inst. 238), the confirmation may be set aside in equity.

See further, Com. Dig. *Confirmation.*

executors of his said will: AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, without issue, leaving the said [*heir*], his heir-at-law, and without having altered or revoked his said will, but the same was never executed by him in the presence of, nor attested by any witnesses: AND WHEREAS the signing of the said will by the said [*testator*] not having been duly attested, the devise therein expressed to be made of the said estate in ——, did not, it is apprehended, pass such freehold estate to his said nephew [*devisee*]; but the said [*heir*], as heir-at-law of the said testator, being willing to comply with the terms of the said will, and being desirous of fulfilling the intention of the said [*testator*], in respect to the devise of the said estate in ——, has, at the request of the said [*devisee*], agreed to confirm the said will in respect to the devise therein contained of the said estate in ——, by assuring the same estate unto and to the use of the said [*devisee*], his heirs and assigns, in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said premises; He, the said [*heir*], according to his estate, right, and interest, but no further or otherwise, hereby grants and confirms unto the said [*devisee*], and his heirs: ALL AND SINGULAR the freehold messuages, lands, tenements and hereditaments which the said testator [*testator*] was, at the time of his signing the said will, seised of or entitled to, situate, lying, and being in the county of ——; TO HOLD all the premises, UNTO AND TO THE USE of the said [*devisee*], his heirs and assigns, AND THE SAID [*heir*] hereby covenants with the said [*devisee*], that he the said [*heir*] has not made, done, executed, committed, or willingly or knowingly suffered, or consented to any act, matter or thing whereby or by reason or means whereof the said hereditaments and premises, or any part thereof, are, is, can, shall, or may be impeached, charged, released, conveyed, assured, or in any wise incumbered: AND MOREOVER that he the said [*heir*], and his heirs, and every other person having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or demand in, to, or out of the said hereditaments and premises, or any of them, or any part thereof, by, from, through, under, or in trust for him or them, will and shall, from time to time, and at all times hereafter, upon every

IV. Confirmation of Unattested Will to Devisee in Fee.

testator's death;

that will was unattested and defective;

but heir-at-law is willing to confirm intended devise.

Testatum.

Confirmation in fee from heir-at-law to intended devisee.

Parcels.

Habendum, to the use of devisee in fee.

Covenant by heir-at-law that he has not incumbered;

and for further assurance.

IV. Confirmation of Unattested Will to Devisee in Fee.

reasonable request, and at the costs and charges of the said [*devisee*], his heirs or assigns, make, do, and execute, all such further and other acts, deeds, conveyances, and assurances in the law whatsoever, for the further and more perfectly and absolutely conveying, and assuring all and singular the said hereditaments and premises, or unto and to the use of the said [*devisee*], his heirs and assigns for ever, or as he or they shall direct or appoint; As by the said [*devisee*], his heirs or assigns, shall be required.

In witness, &c.

V. *DECLARATION of TRUSTS of a sum of* Consols *invested as Security or* Guarantee *for* Secretary *of a* Hospital *or other* Institution.

Parties.

THIS INDENTURE (*h*) made the —— day of ——, 18—, Between [*secretary*], of, &c., of the first part; [*trustee*], of, &c., and [*trustee*], of, &c., of the second part; and [*treasurer*], of, &c., of the third part:

Recitals: of appointment of secretary; and of bond for securing performance of his duties;

Whereas on the —— day of ——, 18—, the said [*secretary*] was appointed secretary of the —— Hospital, and thereupon the said [*secretary*] and [*sureties*] were by a bond dated the —— day of —— 18—, jointly and severally bound to the said Hospital in the penal sum of £——, with a condition therein making void the same on the due discharge of the duties of his office by the said [*secretary*] as such secretary as aforesaid:

of deaths of sureties;

And whereas the said [*surety*] died on or about the —— day of ——, 18—, and the said [*other surety*] died on or about the —— day of ——, 18—,

of proposal for security by way of investment in consols and declaration of trust;

And whereas the said [*secretary*] duly reported the fact of the respective deceases of the said [*sureties*] to the committee of the said Hospital, And the said [*secretary*] at the same time proposed that in lieu of finding other sureties he should invest the sum of £——, in the purchase of $2\frac{3}{4}$ per cent. Consolidated Stock in the joint

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(*h*) Stamp, 10*s*

V. Declaration of Trusts of Guarantee Fund.

names of the said [*trustees*] for securing to the said committee of the said Hospital the due performance of the duties of his office as such [*secretary*] as aforesaid: AND WHEREAS at a meeting of the committee of the said Hospital held on the —— day of —— 18— it was resolved that the said offer should be accepted and that a declaration of trust of the said £2¾ per cent Consolidated Stock proposed to be so purchased as aforesaid should be drawn up accordingly: AND WHEREAS the said [*secretary*] on or about the —— day of —— 18—, in pursuance of, and in part performance of the said proposal invested the said sum of £—— in the purchase of the sum of £—— £2¾ per cent. Consolidated Stock in the joint names of the said [*trustees*]: NOW THIS INDENTURE WITNESSETH that in pursuance, and in further performance of the said proposal, IT IS HEREBY AGREED AND DECLARED, and the said [*secretary*] and [*treasurer*] hereby respectively direct, that they the said [*trustees*], their executors, administrators, and assigns shall stand possessed of the said sum of £—— £2¾ per cent. Consolidated Stock UPON TRUST that they the said [*trustees*] and the survivor of them, and the executors or administrators of such survivor, their and his assigns (hereinafter called "the said trustees and trustee"), shall by and out of the said sum of £—— £2¾ per cent. Consolidated Stock, and the dividends, interest, and annual produce thereof, keep indemnified the said Hospital, its officers, and agents against all losses, damages, costs, charges, and expenses incurred or to be incurred by them, or any of them by or on account of any default, misfeasance, or neglect of the said [*secretary*] in the office of secretary of the said Hospital or by reason or on account or in consequence of any matter or thing whatsoever relating to the said office: PROVIDED NEVERTHELESS and it is hereby agreed and declared that, until there shall be any such misfeasance, default, or neglect as aforesaid, the said trustees or trustee do and shall from time to time as they shall become due pay the dividends, and income of the said sum of £—— £2¾ per cent. Consolidated Stock unto the said [*secretary*], his executors, administrators and assigns; AND it is hereby further agreed and declared that, subject as aforesaid the said trustees and trustee shall stand possessed of the said sum of £—— £2¾ per cent. Consolidated Stock in trust for the said [*secretary*], his

of resolution adopting the proposal;

of purchase of stock in names of trustees.

Testatum.

Declaration of trust.

V. Declaration of Trusts of Guarantee Fund.

executors, administrators, and assigns absolutely: PROVIDED ALWAYS, and it is hereby agreed and declared, that the power of appointing new trustees of these presents shall be exercisable by the said [*secretary*], but no appointment shall be made without the consent in writing of the treasurer for the time being of the said Hospital.

Power to appoint new trustees.

IN WITNESS, &c.

VI. *DECLARATION OF TRUST by the* TRANSFEREE *of a* MORTGAGE *of* PART *of the* MORTGAGE-DEBT *in favour of the* ORIGINAL MORTGAGEE.

THIS INDENTURE (*i*), made the —— day of ——, 18—, BETWEEN [*transferee*], of, &c., of the one part; and [*original mortgagee*] of the other part: WHEREAS [*recite mortgage for* £13,000, *and transfer of even date herewith to transferee*]; AND WHEREAS at the date and execution of the said lastly recited indenture of transfer the sum of £10,000 only, part of the said sum of £13,000, was advanced and paid by the said [*transferee*] to the said [*mortgagee*] and the sum of £3,000, the residue of the said sum of £13,000, together with interest on the said sum of £13,000 from the —— day of ——, 18—, last, (being the last half-yearly day of payment of interest up to the date of the said indenture of transfer), is still the property and money of the said [*mortgagee*], and in consideration thereof the said [*transferee*] has agreed to make and execute the declaration hereinafter contained: NOW THIS INDENTURE WITNESSETH that, in consideration of the premises, and in pursuance of the said agreement, the said [*transferee*] hereby acknowledges and declares that he the said [*transferee*], his heirs, executors, and administrators, shall and will henceforth stand and be possessed of and interested in the said sum of £13,000 and interest, and the securities for the same upon the trusts hereinafter declared of and concerning the same,

Recital that 10,000*l.* only was paid by the transferees, and that 3000*l.* is still the money of the mortgagee.

Testatum.

Declaration of trust of the 13,000*l.*

(*i*) Stamp, 10*s.*

VI. Declaration of Trust of part of Mortgage Debt.

that is to say, As to the sum of £10,000 part of the said sum of £13,000 and the interest henceforth to accrue due on the said sum of £10,000, In trust for himself the said [*transferee*], his executors, administrators, and assigns, And as to the sum of £3,000 residue of the said sum of £13,000 and the interest in the said sum of £13,000 from the —— day of ——, 18—, last, up to the date hereof, and also all interest henceforth to accrue due on the said sum of £3,000, In trust for the said [*mortgagee*], his executors, administrators, and assigns; And upon further trust that until the said sum of £13,000 and interest shall be paid and satisfied, the mortgage securities hereinbefore mentioned shall be held by the said [*transferee*], his heirs, executors, and administrators, as well for the purpose of securing the repayment of the said sum of £10,000 and interest thereon to the said [*transferee*], his executors, administrators, and assigns, as of securing the repayment of the said sum of £3,000 and interest as aforesaid to the said [*mortgagee*], his executors, administrators, and assigns: Provided always, and it is hereby expressly agreed and declared by and between the said parties hereto that the said sum of £10,000 and interest thereon as aforesaid shall have priority of charge and payment over the said sum of £3,000 and interest thereon as aforesaid, and that he the said [*transferee*] his executors and administrators shall and may out of any monies that may come to his or their hands by virtue of the said mortgage securities (except the interest that has accrued due in respect of the said sum of £13,000 from the —— day of —— last, up to the date hereof which is to be paid over to the said [*mortgagee*], his executors, administrators, or assigns, immediately the same is received) in the first place repay to and retain themselves the said sum of £10,000 and interest in preference to the said [*mortgagee*] his executors, administrators, and assigns as to the said sum of £3,000 and interest to accrue due thereon as aforesaid.

Trust for themselves as to 3000*l.* and interest. Trust for original mortgagee.

The mortgage securities to be held to secure both sums.

Proviso that 10,000*l.* to have priority over the 3000*l.*

In witness, &c.

VII. *DECLARATION OF TRUST of a* Lease *of* Slate Quarries *in favour of a* Company. Qualification *of* a Covenant *against* Assignment *without* Licence, *so as to allow* Assignment *to* New Trustees.

THIS INDENTURE (*j*) made the —— day of ——, 18—,

Parties.

Between [*lessor*], of, &c., of the one part, and [*lessee*], of, &c., and [*lessee*], of, &c., of the other part: Whereas by an

Recital of lease of slate quarries.

indenture of lease bearing even date herewith, and made between the said [*lessor*] of the one part, and the said [*lessees*] of the other part, all and singular the beds of slate, stones, ores, minerals and mineral produce now found, gained, dug, or opened, or hereafter to be formed, gained, dug, or opened with, under, or upon all those pieces or parcels of land commencing at the river A—— and ascending to the boundary line on the mountains called or commonly known by the names of ——, containing by admeasurement —a. —r. —p., situate and being in ——, and which land is more particularly delineated in the map or ground plan thereof drawn in the margin of the said indenture now in recital, together with certain liberties, powers, and authorities for getting and working the said slate, stone, ores, minerals and mineral produce, and for other purposes, have been demised and leased by the said [*lessor*] unto the said [*lessees*], their executors, administrators, and assigns, for the term of twenty-one years from the —— day of —— last, subject to the reservations, covenants, and agreements therein contained, and on the part of the said [*lessees*], their executors, administrators, and assigns to be paid, observed,

Covenant against assignment.

and performed; And among the said covenants on the part of the lessees contained in the said indenture of lease, is a covenant against assigning, underletting or otherwise parting with the possession of the said premises thereby demised, or any part thereof, or the said indenture of lease, for all or any part of the said term, without the license and consent in writing of the said [*lessor*], his heirs or assigns, for that purpose first had and

That lease was granted in trust for a company.

obtained, except as therein mentioned: And whereas the lease granted by the hereinbefore recited indenture is taken by the said [*lessees*], with the privity of the said [*lessor*], on

(*j*) Stamp, 1*l.*

VII. Declaration of Trust of Lease of Quarries.

behalf of and in trust for a certain company, which has been formed and established on the cost book principle for getting and working the said slate, stone, ores, minerals, and mineral produce comprised in the said indenture under the name of —— Company; And it has been agreed that a declaration of trust shall be executed to the effect, and in the manner hereinafter appearing; And it has been also agreed by the said [*lessor*], that the said covenant hereinbefore particularised as contained in the said indenture of lease shall be qualified in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf and in consideration of the several matters aforesaid, the said [*lessees*], with the privity and approbation of the said [*lessor*] (testified by his execution of these presents), do hereby declare that they the said [*lessees*], their executors, administrators, and assigns, will stand possessed of and interested in the said slate, minerals, powers and premises comprised in the said indenture of lease, and of and in the same indenture and every renewed or further indenture of lease which may hereafter be granted by the said [*lessor*], his heirs or assigns, under any of the covenants therein contained, IN TRUST for the —— Company, and to be used and dealt with, assigned and disposed of, according to the regulations of the said company for the time being: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance of the said agreement in this behalf, and in consideration of the several matters aforesaid, the said [*lessor*], for himself and his assigns, hereby grants and covenants with the said [*lessees*], that, notwithstanding the said covenant contained in the said indenture of lease against assigning, underletting, or otherwise parting with the possession of the said premises thereby demised, or any part thereof, or the said indenture of lease, without license and consent in writing of the said [*lessor*], his heirs or assigns (except as therein mentioned), or by way of qualification of the same covenant, it shall be lawful for the said [*lessees*], their executors, administrators, and assigns respectively, from time to time, and at all times hereafter, to assign and make over or part with the possession of the said premises comprised in the said indenture of lease, or any part thereof, and the said indenture of lease, and any renewed or further indenture of lease which may be granted by the said [*lessor*],

Agreement to execute declaration of trust and qualify covenant against assignment.

Testatum.

Declaration of trust of present and future leases for company.

Second *testatum.*

Notwithstanding covenant against assignment without licence, trustees may assign to new trustees.

VII. Declaration of Trust of Lease of Quarries.

his heirs or assigns, under any of the covenants contained in the same indenture, to any other person or persons on behalf of and in trust for the said company, to the intent that the same may be vested in every such trustee or trustees without first obtaining the license or consent in writing of the said [*lessor*], his executors, administrators, or assigns; PROVIDED ALWAYS, and it is hereby agreed and declared, that, subject to the grant and covenant hereinbefore contained, and the qualification intended to be thereby made, the said last-mentioned covenant shall continue in full force.

Subject to qualification covenant to remain in force.

IN WITNESS, &c.

VIII. *STATUTORY DECLARATION as to* IDENTITY, *and uninterrupted* POSSESSION *of* PARCELS (*k*).

Declaration.

WE (*l*), [*owner*], of, &c., [*tenant*], of —— Farm, in the County of ——, Farmer, and [*agent*], a partner in the firm of —— & Co., surveyors and land agents, of, &c., do solemnly and sincerely declare as follows:—

1. I, the said [*owner*], for myself declare that I have been intimately acquainted with the X. estate and other properties hereinafter mentioned, all situate in the several parishes of —— and ——, in the county of —— aforesaid, from the

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(*k*) Where the evidence as to identity of parcels forming property contracted to be sold is insufficient, it is very usual to stipulate in the contract or conditions of sale that the purchaser shall accept the statutory declaration of some person acquainted with the facts, stating that the property offered for sale has been held by its present description for a number of years specified in the declaration, and explaining any apparent discrepancies in the description of the parcels as given in the abstract of title or other documents. And recourse is often had to such declarations as evidence on other matters on which the title depends, where it is impossible or difficult, except with expense or delay, to obtain evidence of a more strict character. See as to conditions of sale requiring a purchaser to be satisfied with such evidence, *ante*, sub tit. "CONDITIONS OF SALE," Vol. II., pp. 683 *et seq.*

(*l*) Stamp, 2*s.* 6*d.*

VIII. Declaration as to Identity of Parcels.

dates of the several conveyances thereof respectively hereinafter mentioned.

2. The said X. estate was by an indenture dated, &c., conveyed to me, and is in the said indenture described by reference to a schedule, the particulars of which said schedule are set out in the first part of the first schedule hereto.

3. By an indenture dated, &c., certain plots of land, part of the glebe lands belonging to the rector of —— aforesaid, were conveyed to me; the said glebe lands are conveyed by reference to a schedule, the particulars of which said schedule are set out in the second part of the first schedule hereto.

4. The Y. estate, situate in the parish of —— aforesaid, was by an indenture dated, &c., conveyed to me; the particulars of such last-mentioned estate are set out in the third part of the first schedule hereto.

5. The second schedule hereto sets out, to the best of my belief, the present measurements of, and the plan annexed hereto shows, to the best of my belief, the present abuttals and boundaries of the said X. estate, the said glebe lands, and the said Y. estate respectively; and I have been ever since the dates of the several conveyances of the same premises respectively hereinbefore mentioned, in the free and undisturbed possession and enjoyment or receipt of the rents and profits of such several lands, estates, and premises, with the appurtenances thereof, as containing such admeasurements and with such abuttals and boundaries as hereinbefore mentioned.

6. I, the said [*tenant*], for myself declare and say that I have been intimately acquainted with the said X. estate, the said glebe lands, and the said Y. estate respectively for —— years and upwards, and that I have continuously since the year 18—, been in occupation of and farmed all the said premises as tenant thereof, and have continuously during that period from time to time paid the rents of the same premises as they accrued due to the said [*owner*], or to the said [*agent*] as his agent, and to no other person or persons whatsoever.

7. I, the said [*agent*], for myself declare that I have, during the —— years last past, resided at —— aforesaid, and have for the —— years last past and upwards up to the present time, been continuously employed by, and acted as agent to the said [*owner*], and am well acquainted with the said X.

VIII. Declaration as to Identity of Parcels.

estate, the said glebe lands, and the said Y. estate respectively, and have during that period, as such agent, continuously received the rents thereof respectively on behalf of the said [*owner*].

8. We, the said [*tenant*] and [*agent*], severally declare that we have carefully examined the said two schedules hereto, and also the said plan, and that the said plan and second schedule hereto correctly describe and show the said X. estate, the said glebe lands, and the said Y. estate respectively, the old descriptions and measurements being set out in the said first schedule hereto, and that the plots numbered on the said plan have been particularly examined by us in the said plan, and our attention was called thereto, as to which said plots we say that they now form, and always, to the best of our knowledge, recollection and belief, have formed part of the said X. estate, and have always been cultivated and enjoyed as part of the same estate.

And we respectively make this declaration, conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

The First Schedule above referred to.

The Second Schedule above referred to.

IX. *STATUTORY DECLARATION as to* Pedigree *and other matters affecting Land contracted to be sold* (*m*).

Declaration.

I (*n*), [*declarant*], of [X.], in the county of [Y.], widow, do hereby solemnly and sincerely declare as follows:—

1. I was, in the year 18—, married to [A. B.], late of

(*m*) In matters of descent, a statutory declaration is not generally admissible in Court unless the declarant is dead and the declaration is made against his interest, or unless the declarant is a member of the family: see *ante*, sub tit. "Abstracts," Vol. I., pp. 149 *et seq.*

(*n*) Stamp, 2*s.* 6*d.*

IX. Declaration as to Pedigree.

[X.], aforesaid, and I am the person of the name mentioned in the certificate of marriage now produced to me and marked with the letter A (*o*); and that the said [A. B.] died on the —— day of ——, 18—.

2. I was well acquainted with [C. B.] and [D. B.] his wife, who many years since resided at [Z.], in the county of [Y.], aforesaid; And, as I am informed and believe, they were married in the parish church of [W.], in the city of [V.], on the —— day of ——, 18—, the said [C. B.] and [D. B.] are the persons respectively mentioned in the certificate of marriage now produced to me and marked with the letter B.

3. The said [C. B.] died and was buried at [Z.], aforesaid, in or about the year 18—, leaving the said [D. B.] his widow and three children, him surviving, namely two sons [E. B.] and [F. B.], and one daughter [G.] the wife of [H. C.].

4. I well knew the said [E. B.] and I was present at his marriage with [I. D.], at [U.], in the year 18—, and she died shortly after the said marriage without issue; and I am informed and believe that the said [E. B.] never married again, but died in the year 18—, without issue. The said [E. B.] is the person of that name mentioned in the three several certificates of baptism, marriage, and death now respectively produced to me and marked with the letters C, D, and E respectively.

5. I well know the said [F. B.], and I am informed and believe that he married [J. E.] at [T.], in the year 18—; that he had a daughter [K.], who was his only child, and who died in his lifetime, and that he died on the —— day of ——, 18—. He is the person of that name mentioned in the three several certificates of baptism, marriage, and death respectively now produced to me and marked with the letters F, G, and H respectively. The said [K. B] is the person of that name mentioned in the two several certificates of birth and death respectively now produced to me and marked with the letters I and K respectively. The said [J. B.] widow of the said [F. B.] is still living, and resides at [S.].

6. I have been informed and believe that the said [G. C.], formerly [G. B.], married the said [H. C.] at [S.], in the year 18—, and that they had two children only, namely, one son

(*o*) Where a declaration is made by a wife as to her husband's family, her relationship must be proved: see *ante*, Vol. I., p. 151.

IX. Declaration as to Pedigree.

[L. C.] and one daughter [M. C.]. The said [G. C.] died on the —— day of ——, 18—, and she is the person of that name mentioned in the three several certificates of baptism, marriage, and death respectively now produced to me and marked with the letters L, M, and N respectively.

7. I have been informed and believe that the said [L. C.] sailed in the month of January, 18—, in the ship ——, bound from Bristol to New Zealand; that the said ship has never since been heard of and that no letters or tidings have since been received from or with regard to him by any of his family and I verily believe him to be dead and that he died a bachelor and intestate. The said [L. C.] is the person of that name mentioned in the certificate of birth now produced to me, and marked with the letter O.

8. The said [M. C.] attained the age of 21 years on the —— day of ——, 18—, and has never yet been married, and I verily believe that the said [M. C.] is the niece and heiress-at-law of the said [E. B.]. She is the person of that name mentioned in the certificate of birth now produced to me, and marked with the letter P.

And I make this declaration, &c.

X. *STATUTORY DECLARATION as to* Payment *of* Testator's Debts, &c., *and of no* Settlement *on a* Marriage.

Declaration.

I (*p*) [*declarant*] of, &c., do hereby solemnly and sincerely declare as follows:—

1. That I was one of the executors named in the will, dated, &c., and proved, &c., of my father [*testator*], late of, &c., deceased; And, as such executor, I say that all the funeral and testamentary expenses and debts of the said [*testator*] have long since been paid and satisfied.

2. That I am a widower, my late and only wife [*name*] having died on the —— day of ——, 18—.

3. That my said late wife [*name*] was the person of that

(*p*) Stamp, 2*s.* 6*d.*

name mentioned in the certificate of death hereunto annexed, and marked A.

4. That there was no settlement or agreement for a settlement made by me on or before the marriage between myself and my said late wife, nor was any such settlement ever made during our coverture.

And I make this declaration, &c.

XI. *FORMS of* Directions *and* Consents *with regard to Express and Statutory* Trusts *and* Powers.

1.

Direction *or Consent as to Investment of Trust Funds.*

TO [*trustee*] of, &c. and [*trustee*] of, &c., the trustees of an indenture of settlement, dated, &c., and made on the occasion of our marriage.

We, the undersigned, hereby direct you to invest [*or* consent to your investing] the sum of £——, now in your hands, as trustees of the said settlement, upon mortgage of freehold hereditaments, belonging to [*intended mortgagor*], and situate at ——, in the county of ——, and containing by admeasurement —— acres or thereabouts.

As witness, &c.

[*Signatures of Husband and Wife.*]

2.

Direction *by Tenant for life as to Investment of Capital Moneys.*

TO [*trustee*] of, &c. and [*trustee*] of, &c., the trustees of the settlement created by the will dated, &c., of [*testator*], late of, &c., who died on the —— day of ——, 18—.

I [*tenant for life*] of, &c., by virtue of the powers vested in me by the Settled Land Act, 1882, as tenant for life, in

XI. Directions and Consents.

possession of the —— estate, devised and settled by the said will, do hereby direct you to invest the sum of £——, now in your hands, as such trustees as aforesaid, being capital moneys arising under the said Act, in the purchase of, &c. [*state proposed investment*].

As witness, &c.

[*Signature of Tenant for Life.*]

3.

Direction *by widow to vary Investment.*

TO [*trustee*] of, &c., and [*trustee*] of, &c., the trustees of an indenture of settlement, dated, &c., being the settlement made on the occasion of my marriage with my late husband [*husband*], of, &c., deceased.

I [*widow*] of, &c., widow of the said [*husband*], who died on the —— day of ——, 18—, hereby request and direct you to sell out the sum of £——, £2$\frac{3}{4}$ per cent. Consolidated Stock, now standing in your names as trustees of the said settlement, and to invest the proceeds of such sale (after paying thereout the costs of such sales and re-investment), in the purchase of, &c. [*state proposed investment*]; and if by reason of the market, or any other circumstances, it shall appear to you inexpedient to invest the said proceeds of sale as hereinbefore mentioned, then I request and direct you to invest the said proceeds of sale in any other one or more of such stocks, funds, shares or securities as are authorised by the said settlement for the investment of the trust funds for the time being, subject to the trusts and provisions thereof.

As witness, &c.

[*Signature of Widow.*]

4.

Consent *of Tenant for Life to Alteration of Investment of Capital Moneys.*

TO [*trustee*] of, &c., and [*trustee*] of, &c., the trustees of a settlement created by an indenture dated, &c., and made between [*parties*].

I [*tenant for life*], of, &c., by virtue of the powers vested in me by the Settled Land Act, 1882, as tenant for life, in

possession of the lands and hereditaments comprised in and settled by the said indenture of settlement, hereby consent to the following alteration of the investment of part of the capital moneys arising under the said Act, and subject to the limitations and trusts of the same indenture, that is to say: that you shall and may, as soon as conveniently may be, call in the sum of £—— (part of such capital moneys as aforesaid), now secured upon mortgage of certain lands and hereditaments at ——, in the county of ——, belonging to Mr. ——, and to invest the same (after paying all costs of such calling in and reinvestment), in the purchase of, &c. [*state proposed investment*].

As witness, &c.

[*Signature of Tenant for Life.*]

5.

Direction *by Tenant for Life for Purchase of Lands to be settled, and Application of Capital Moneys in payment of Purchase Money* (*p*).

TO [*trustee*] of, &c., and [*trustee*] of, &c., the trustees of the settlement created by, &c.

Whereas it has been recently agreed between [*vendor*] of, &c., and yourselves, at my request (as I hereby acknowledge), that you shall purchase from him, in fee simple, and free from incumbrances, all and singular the farm-house, farm cottages, closes of land and hereditaments situate, &c., and known as the —— Farm, and containing by admeasurement —— acres or thereabouts, for the sum of ——; And whereas the title of the said [*vendor*] has been investigated and found to be satisfactory: Now I [*tenant for life*], of, &c., do hereby, by virtue of the powers vested in me by the Settled Land Act, 1882, as tenant for life of the lands comprised in and settled by the said indenture of settlement, direct and authorise you to complete the purchase of the said premises, and to accept a proper conveyance thereof from the said [*vendor*] and all other necessary parties (if any);

(*p*) The direction of a tenant for life for the purchase of lands to be settled and for the application of capital monies in payment of the purchase-money, is usually testified by his execution of the conveyances (see *ante*, Vol. V., pp. 451, 453); but circumstances may sometimes render this course inconvenient, in which case a separate instrument will be required.

XI. Directions and Consents.

And further to sell out a competent part of the sum of £—— £2¾ per cent. Consolidated Stock, now standing in your names as trustees of the said settlement, and representing capital moneys arising under the said Act, and to apply the proceeds of such sale in payment of the said purchase money or sum of £—— to the said [*vendor*] or other the person or persons entitled thereto, upon the execution by him or them on the —— day of —— next, or such later day as may be appointed for the completion of the said purchase of such conveyance of the premises as aforesaid, and in payment of the costs and expenses of and incident to such purchase.

As witness, &c.

[*Signature of Tenant for Life.*]

6.

Consent *by Trustees of a Settlement to Sale by Tenant for Life of the Principal Mansion House, &c.*

TO [*tenant for life*] of, &c., the tenant for life, in possession of the —— Estate, under a settlement created by an indenture of settlement, dated, &c., and made between [*parties*].

We, the undersigned, the trustees of the above-mentioned settlement, do hereby, pursuant to the provisions in this behalf contained in the Settled Land Act, 1882, consent to your selling [*or* leasing for a term not exceeding —— years] the Mansion House called —— Hall, in the county of ——, and the demesne and other lands hitherto held therewith, and particularly described in the schedule hereunder written.

As witness, &c.

[*Signature of Trustees.*]

Schedule.

7.

Direction *or consent for the Advancement of a Child* (*q*).

TO [*trustee*] of, &c., and [*trustee*] of, &c., the trustees of an indenture of settlement dated, &c., and made on the occasion of our marriage.

(*q*) A memorandum of the advancement should be endorsed on the settlement.

XI. Directions and Consents.

We, the undersigned, hereby direct you to raise [*or* consent to your raising] the sum of £——, part of the expectant share of our son [or daughter] [A. B.], under the trusts of the said settlement, by selling out a competent part of the sum of £—— £2¾ per cent. Consolidated Stock now standing in your names as trustees of the said settlement, and to apply [*or* and to your applying] the same in or towards payment of the stamp duty, premium, and expenses payable in respect of the articles of clerkship to be entered into by our said son with Messrs. —— & Co., of, &c., Solicitors [*or* in or towards providing an outfit for our said daughter on the occasion of her intended marriage with [C. D.] of, &c.].

As witness, &c.

[*Signature of Father and Mother.*]

8.

Direction *under a Power contained in a Will, that the Trustees should convey Part of the Lands devised, so that an intended Wife should, in case the Marriage took Effect, and she survived her Husband and Two other Persons, yearly receive an Annuity* (*r*).

Exordium.

TO ALL TO WHOM these presents shall come, [B. G.], the wife of [J. G.], of &c., esquire, sendeth greeting: Whereas [*testator*], late of &c., by his will, dated &c., after giving several specific and pecuniary bequests and annuities, gave, devised and bequeathed All his lands, &c., unto [*trustees*], their heirs, executors, administrators, and assigns, Upon trust that they the said [*trustees*], and the survivor of them, and the heirs of such survivor should stand seised and possessed of all his said freehold estates, &c., Subject nevertheless, to the said annuities, In trust to permit and suffer his sister the said [B. G.] and her assigns, to receive and take to her and their own use and uses, the rents, interest, dividends, profits, and produce thereof, during her life; And from and after the decease of his said sister [B. G.], then, In trust to pay and apply, convey and dispose of his said freehold estates, &c.

Recitals: of will, whereby testator gave all his lands, &c., to two trustees upon certain trusts.

(*r*) Stamp, 10*s*.

XI. Directions and Consents.

Subject nevertheless to the said annuities, unto such person and persons, and for such estate and estates, and at such time and times, and in such manner and form as his said sister [B. G.], notwithstanding her coverture, by any deed [or writing] or by will, should direct, limit, or appoint: And he thereby appointed the said [*trustees*], executors of his said will: And whereas the said [*testator*] died, &c., without altering or revoking his said will; And the said will was on the —— day of —— 18—, duly proved in the Principal Registry of the Probate Division of the High Court of Justice by the said executors:

of death of testator, &c.;

of marriage;

And whereas a marriage has been agreed upon, and is intended shortly to be solemnized, between [*intended husband*], nephew of the said [B. G.], and [*intended wife*], spinster, eldest daughter of [Sir J. S. A.], baronet, deceased: And whereas upon the treaty for the said intended marriage, the said [B. G.] agreed to secure to be paid to the said [*intended wife*], and her assigns, during her life, in case the said intended marriage should take effect, and she the said [*intended wife*], should survive the said [*intended husband*], [B. G.], and [J. G.], a clear annual sum of £——, in manner hereinafter mentioned:

of agreement for securing annuity.

Testatum.

Direction to trustees to convey lands.

NOW THESE PRESENTS WITNESS that, in pursuance and performance of the said agreement, and in consideration of the natural love and affection which the said [B. G.] hath for the said [*husband*], her nephew, and in consideration of the said intended marriage, She the said [B. G.], pursuant to and in exercise of the power to the said [B. G] given by the said will of the said [*testator*], and of all other powers and authorities enabling her in that behalf, Doth, by this deed or writing, duly executed by her, direct the said [*trustees*], their heirs and assigns, to convey, settle, and assure, such and so many, and such part or parts of the lands, tenements and hereditaments, so by the said will of the said [*testator*] devised to the said [*trustees*], and their heirs, In trust as aforesaid, as shall be of the yearly value of £——, clear of the land-tax, and all other taxes, and deductions whatsoever, in such manner, as that the said [*wife*], and her assigns, shall (in case the said intended marriage shall take effect, and she shall survive all of them the said [*husband*], [B. G.], and [J. G.]), from and immediately after the decease of the longest liver of them the said [*husband*], [B. G.], and [J. G.], yearly, receive, take, and enjoy, during her life, out of the rents, issues, and profits of the said

lands, and hereditaments, the yearly sum of £——, clear of the land-tax, and all other taxes, and deductions whatsoever; to be paid by four equal quarterly payments, in every year; the first quarterly payment thereof to be made at the end of three calendar months, to be computed from the time of the decease of the longest liver of them the said [*intended husband*], [B. G.], and [J. G.].

XI. Direction and Consents.

In witness, &c.

XII. *CONVEYANCE by* Trustees *for* Sale *of* Freeholds *to a* Beneficiary *absolutely entitled to proceeds of sale, who* elects *to* take *the Property as* Realty.

THIS INDENTURE (*s*) made the —— day of ——, 18—, Between [*trustee*], of, &c., and [*trustee*], of, &c., of the one part; and [*beneficiary*], of, &c., of the other part: Whereas [*testator*], late of, &c., deceased, duly made and executed his will, dated, &c., and thereby, after giving divers specific and pecuniary legacies as therein mentioned, gave, devised and bequeathed all his real estate and all the residue of his personal estate whatsoever and wheresoever unto the said [*trustees*], their heirs, executors, administrators and assigns, according to the nature and tenure of the same premises respectively upon trust to sell and convert the same into money and invest the proceeds of such sale and conversion, with power to vary investments as therein mentioned; And the said [*testator*] thereby declared that the trustees or trustee for the time being of his said will should stand possessed of the said proceeds of sale and conversion of his real and residuary personal estate after payment thereout of his funeral and testamentary expenses and debts, and the pecuniary legacies bequeathed by his said will, upon trust to invest the

Parties.

Recitals: of devise of lands on trust for sale:

(*s*) Stamp, 10*s*.

XII. Conveyance of Freeholds by Trustees for Sale to Beneficiary.

same as therein mentioned, and should stand possessed of such investments and income thereof upon trust to pay the income thereof unto his son [*name*], since deceased, and his assigns during his life, and after his decease to pay and divide the capital of the said trust premises unto and among all and every the children or child of the said [*son*], who being sons or a son should attain the age of twenty-one years, or, being daughters or a daughter should attain that age or marry, and if more than one such child in equal shares, but if there should be but one such child then the whole to be in trust for such one child; And the said [*testator*] thereby further declared that his said trustees or trustee should pay and apply the rents and profits of his real estates until sale thereof in like manner as was thereby directed concerning the income arising from the proceeds of such sale and conversion, and the investments thereof as aforesaid; and he thereby appointed the said [*trustees*] to be the executors of his said will:

of death of testator and probate of will;

And whereas the said [*testator*] died on the —— day of ——, 18—, without having revoked or altered his said will, and the same was on the —— day of ——, 18—, duly proved in the Principal Registry of the High Court of Justice, Probate Division, by the said [*trustees*], the executors thereof:

of testator's seisin;

And whereas the said [*testator*] was at the time of his death seised of the messuage lands and hereditaments hereinafter described, and hereby assured for an estate in fee simple in possession free from incumbrances;

of death of tenant for life, and state of family;

And whereas the said [*son*] died on the —— day of ——, 18—, leaving the said [*beneficiary*], who attained the age of twenty-one years on the —— day of ——, 18—, his only surviving child, and having had only one other child [*name*], who died an infant on the —— day of ——, 18—;

that no sale has taken place;

And whereas the funeral and testamentary expenses and debts of the said [*testator*], and the pecuniary legacies bequeathed by his said will have long since been paid and satisfied, but the said messuage lands and hereditaments hereby assured have never yet been sold and the rents and profits thereof have from time to time been received by the said [*son*] up to his death, and thereafter up to the date of these presents by the said [*beneficiary*] (as he the said beneficiary hereby acknowledges);

of agreement for conveyance of lands to beneficiary.

And whereas the said [*beneficiary*] is desirous of taking the said messuage lands and hereditaments hereby assured in their actual state as realty, and the said [*trustees*] have accordingly, at his

request, agreed to assure and convey the same to him in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the premises, they the said [*trustees*] hereby as trustees convey unto the said [*beneficiary*] and his heirs, ALL AND SINGULAR that and those the messuage, &c. [*describe parcels*], TO HOLD the same premises, UNTO AND TO THE USE of the said [*beneficiary*], his heirs and assigns, absolutely freed and discharged from the trusts, powers and provisions declared and contained concerning the same by and in the hereinbefore recited will of the said [*testator*].

XII. **Conveyance of Freeholds by Trustees for Sale to Beneficiary.**

Testatum.

Grant of freeholds.

Habendum.

To beneficiary in fee absolutely.

IN WITNESS, &c.

XIII. *LICENCE by* LANDOWNER *to* COMMITTEE *of* CRICKET CLUB *to erect* PAVILION, *and use ground for* CRICKET *and* LAWN-TENNIS.

AN AGREEMENT (*t*) made this —— day of ——, 18—, BETWEEN [A.B.], of, &c., (hereinafter called the licensor) of the one part; and [C.D.], of, &c., [E.F.], of, &c., [G.H.], of, &c., members of the committee of the —— cricket club (hereinafter called the committee) of the other part; WITNESSETH as follows:—

Parties.

Testatum.

1. The licensor hereby gives permission and licence to the committee with workmen and others from the —— day of —— next, to enter into and upon the close of the licensor known as —— field situate, &c., and containing by estimation —— acres, and to lay down and level such portions and so much of the surface thereof as shall be suitable for the purpose of playing the games of cricket and lawn-tennis, and to make suitable provision for fencing off so much of the ground so levelled as shall amount in the whole to not more than —— acres. And also to erect in a suitable position in the said close a wooden building or pavilion for the purposes usually served by similar buildings.

Licence to erect pavilion, and level cricket ground, &c.

(*t*) Stamp, 6*d*.

XIII. Licence to Cricket Club to Level Field, Erect Pavilion, &c.

Regulations as to user of ground.

2. The committee shall be entitled to use by themselves and by the members of the said cricket club and by the friends and guests of such members, the whole of the said close except so much thereof as shall be used as a pen under the —— clause hereof, for the purposes aforesaid subject to the restrictions following that is to say; [the close shall not be used in any way by the committee or by any member of the club upon Sundays, Christmas Day, or Good Friday :] the committee shall not keep or offer for sale or permit to be kept or offered for sale on the said close any malt or spirituous liquors or any other form of refreshment for the sale of which an excise or other licence is required : the committee shall not charge or allow to be taken any payment for admission to the said close other than the usual subscription of members without the express permission in writing of the licensor; and the licensor reserves to himself the right to use such parts of the said close as are not fenced off under the provision hereinafter contained in such manner as he shall think fit, whether for the feeding of cattle, sheep, horses, or other animals or for any purpose whatsoever; and it shall be incumbent upon the committee from time to time to give to the licensor due notice of the days and hours when the said game of cricket is to be played, in order that the licensor or his servants may either remove from the said close any animals which may be thereon, or pen them into a remote part of the said close.

Committee may fence in cricket ground.

3. It shall be lawful for the committee to erect a temporary and moveable fence of any suitable form and material round one or two portions of the levelled surface of the said close (such portion or portions not to contain altogether an area of more than —— acres), for the purpose of keeping cattle, sheep and horses, from such levelled surface, and the licensor shall not be liable for any damage whatsoever which may happen or be done to such levelled surface, whether fenced in or not, or to the fence or fences thereof.

Rent.

4. The committee shall pay to the licensor the annual sum of £—— payable in advance, in equal half-yearly payments on the —— day of ——, and the —— day of ——, the first of such payments being made on the —— day of —— next, for every year or portion of a year during which the present licence shall continue.

Licence not

5. The present licence shall not be deemed to confer upon

XIII. Licence to Cricket Club to Level Field, Erect Pavilion, &c.

the committee or upon any member of the club any estate or interest in the said close or in the surface or soil thereof.

to confer interest in land.

6. The licensor may revoke or determine the present licence at any time, but, except in case of the breach by the committee or by any member of the said club of any of the stipulations herein contained, only upon giving one calendar month's notice in writing of his intention to revoke or determine the said licence, but, except in case of such breach as aforesaid, he hereby undertakes not to revoke or determine the said licence before the 30th day of September, 18—, or between the 25th day of March and the 30th day of September in any year.

Power for licensor to determine licence.

As witness, &c.

XIV. *LICENCE TO USE an* Ornamental Enclosure *or* Garden *in respect of a* Town House *demised by an* Indenture *of even date.*

THIS INDENTURE (*u*) made the —— day of ——, 18— Between [*licensor*], of, &c., (who and his heirs and assigns (*x*), unless the contrary appears are hereinafter called, "the said grantor") of the one part, and [*licensee*] of, &c. (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called "the said grantee") of the other part: Whereas by an indenture bearing even date with but executed immediately before these presents and made between the same persons as are parties hereto and in the same order (*y*), for the considerations therein mentioned,

Parties.

Recital.

(*u*) Stamp, 10*s*.

(*x*) If the licensor is a lessee of the enclosure, say,

"who and his executors, administrators, and assigns, are," &c.

(*y*) If the lease of the house was granted by the freeholder to a builder's nominee, say,

"and made between [*freeholder*] of the one part, the said grantor of the second part, and the said grantee of the third part."

XIV. Licence to Use Ornamental Enclosure.

ALL THAT [*describe parcels as in the lease*] were demised unto the said grantee for the term of ninety-nine years from the —— day of ——, 18—, at the yearly rent thereby reserved, and subject to the covenants and conditions therein contained;

Parcels.

Recital of agreement for licence.

AND WHEREAS the said grantee as such lessee of the said demised premises, is desirous of having the right of entry and user of the ornamental enclosure or garden hereinafter described, and the said grantor has agreed to grant such rights to the said grantee upon the terms and conditions hereinafter appearing:

Testatum.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the yearly sum hereinafter covenanted to be paid by the said grantee, and of the covenants and conditions hereinafter contained, and on the part of the said grantee to be performed and observed,

Covenant by grantor to maintain garden.

he, the said grantor hereby covenants with the said grantee that, the said grantee paying the said annual sum at the times and in manner hereinafter mentioned, and performing and observing the covenants and conditions on his part herein contained, the said grantor will (subject to the provisoes and conditions hereinafter contained) during the continuance of the said term of ninety-nine years maintain and preserve the ornamental enclosure or garden situate in —— Square aforesaid, and the rails and fences thereof, for the use and enjoyment of the said grantee, his executors, administrators, and assigns, being the owner or owners respectively for the time being of the said demised messuage and premises in common with the said grantor and other the licensees for the time being of the said grantor:

Licence to grantee to use garden.

AND the said grantor hereby further grants and covenants to and with the said grantee that he the said grantee, his executors, administrators, and assigns (being respectively owners or occupiers for the time being of the said hereinbefore described messuage and premises), and such of his and their friends as may for the time being be actual inhabitants of the aforesaid messuage or tenement, shall, at all times during the continuance of the said term, have liberty to use and walk in the same ornamental enclosure or garden, subject nevertheless to the rules and regulations which may from time to time be made by the said grantor or other the owner or owners for the time being of the said ornamental enclosure or garden respecting the user and enjoyment thereof:

Proviso that

PROVIDED NEVERTHELESS that this licence

XIV. **Licence to Use Ornamental Enclosure.**

shall continue only so long as the said messuage and premises shall be used and occupied as a private dwelling-house or as a professional residence for a physician or surgeon (not having patients to reside in such house); PROVIDED ALSO that nothing herein contained shall extend to impose any liability upon the said grantor to continue the superintendence and care of the said ornamental enclosure or garden during the aforesaid term in case he or they shall hand over the superintendence and care thereof, if or when he shall think fit, to the owners (*z*), lessees or occupiers of the houses in or fronting or abutting upon —— Square aforesaid, and such other persons (if any) as may have a right of user over the said ornamental enclosure or garden, or a committee of them, or to the vestry of the said parish of ——, in the county of ——, or to the —— County Council, or any other properly constituted public authority or authorities, if the said freeholder, or the said owners, lessees or occupiers, or the said vestry or County Council, or such other properly constituted authority or authorities will undertake the superintendence and care thereof in manner hereinbefore provided for the benefit of the owners, lessees or occupiers of the houses in or fronting or abutting upon —— Square aforesaid, and such other persons (if any) as may have a right of user over the said ornamental enclosure or garden; and that thereupon all liability of the said grantor as regards the superintendence and keeping up of the same shall cease: PROVIDED ALWAYS, and it is hereby agreed that the licence hereinbefore granted to the said grantee to use and walk in the said ornamental enclosure or garden is granted upon the express condition that it shall be lawful for the said grantor or other the owner or owners for the time being of the said ornamental enclosure or garden, at any time and from time to time during the continuance of this grant, to revoke or suspend such licence, if the said grantee shall in any respect infringe or disregard any of the rules or regulations which may from time to time be made by the said grantor, or other such owner or owners as aforesaid,

right of user shall continue while house is occupied as a private residence only.

Proviso as to cesser of grantor's liability to maintain garden.

Power for grantor to revoke licence.

(*z*) If the grantor holds under a lease insert here,—"to the freeholder thereof for the time being or to the owners," &c.

XIV. Licence to Use Ornamental Enclosure.

for the management, user and enjoyment of such ornamental enclosure or garden; And the said grantee hereby covenants with the said grantor that he the said grantee, or other the person or persons for the time being in the actual occupation of the messuage or tenement and premises hereinbefore described, will henceforth during the residue of the said term of ninety-nine years, pay unto the said grantor or other the owner or owners for the time being of the said enclosure or garden the yearly sum of £——, by equal quarterly payments on the usual quarter days in each year in respect of the use and enjoyment of the said ornamental enclosure or garden by him or them under the licence hereinbefore contained and as a contribution towards the expense of the management of and keeping in good order and condition as aforesaid such ornamental enclosure or garden, and the rails and fences thereof; And that he the said grantee or other such person or persons as aforesaid shall and will during the residue of the said term at all times duly observe, perform, and keep the rules and regulations from time to time made by the said grantor or other such owner or owners as aforesaid for the management, user and enjoyment of such ornamental enclosure or garden, and will at all times cause such rules and regulations to be duly observed and performed and kept by all such members of his family and household as may use the said ornamental enclosure or garden; And also shall within three calendar months after the execution of any assignment of these presents produce such assignment at the office of the solicitor of the grantor so that the particulars thereof may be taken down in writing at an expense to the said grantee of £——.

Covenants by grantee: to pay annual sum for user of garden;

to observe regulations;

to give notice of assignment of licence.

In witness, &c.

XV. *BYE-LAWS for the* REGULATION *and* MANAGEMENT *of a* COMMON (*a*).

THE —— COMMON.

1. In the construction of these bye-laws the term "—— Common" means —— Common in the parish of ——, in the county of ——, and includes —— in the same parish. Interpretation clause.

(*a*) Commons, as regards their regulation and management, may be divided into three classes, that is to say, (i.) Metropolitan Commons; (ii.) Suburban Commons; (iii.) other commons not belonging to the two former classes.

(i.) *Metropolitan Commons.*—The Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), applies "to any common the whole or any part whereof is situate within the Metropolitan Police District as defined at the passing of this Act:" see sect. 4 of the Act. A scheme for the making of Bye-laws and Regulations for the prevention of nuisances and the preservation of order thereon may be made under the Act of 1866 "on a memorial in that behalf presented to the [Inclosure] Commissioners by the Lord of the Manor, or by any commoners, or by the Local Authority, or in case of a common extending into the districts of two or more of the bodies described in the first schedule to this Act, then by any one or more of such bodies:" see sect. 6. The Local Authorities, or bodies referred to in sect. 6, are thus defined in the first schedule to the Act:—

DESCRIPTION OF LOCAL AUTHORITY.

Metropolitan Common.	Local Authority.
A metropolitan common, the whole or any part whereof is situate within the metropolis, is defined by the Metropolis Management Act, 1855.	The Metropolitan Board of Works.
A metropolitan common, the whole or any part whereof is situate within the district of a Local Board of Health constituted under the Public Health Act, 1848, and the Local Government Act, 1858, or one of them, and no part whereof is situate within the metropolis as defined as aforesaid.	The Local Board.
Any other metropolitan common.	The Vestry of the Parish in whic the common or any part thereof is situate.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), sect. 40 (8), all the powers, duties, and liabilities of the Metro-

XV. Bye-Laws for Regulation of Common.

The term the "Conservators" means the conservators for the time being regulating and managing —— Common by

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politan Board of Works are transferred to the London County Council.

By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 48, the Inclosure Commissioners became the Land Commissioners for England; and by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), sect. 2, the powers of the Land Commissioners are transferred to and vested in the Board of Agriculture.

Sects. 7 to 27 of the Act of 1866 contain provisions as to presentation of the memorial and approval of the scheme and other matters relating thereto. By sect. 22 of the Act, a certified scheme has of itself no operation till confirmed, with or without modification, by an Act of Parliament.

By the Metropolitan Commons Amendment Act, 1869 (32 & 33 Vict. c. 107), sect. 3, "A scheme may be made under the Metropolitan Commons Act, 1866, on a memorial in that behalf presented to the Commissioners by any twelve or more ratepayers, inhabitants of the parish or parishes in which the Metropolitan Common is situate, as well as by any such person, persons, or body as is or are described in section 6 of the said Act."

And by the Metropolitan Commons Act, 1878 (41 & 42 Vict. c. 71), sect. 2, certain powers are given to the Metropolitan Board of Works to acquire and hold common rights; and by sect. 3 of the same Act, sects. 30 and 31 of the Commons Act, 1876 (noticed below), are extended to Metropolitan Commons.

As to the regulation of open spaces (other than commons) in the Metropolis, see the Metropolitan Open Spaces Acts, 1877 and 1881 (40 & 41 Vict. c. 35; 44 & 45 Vict. c. 34).

(ii.) *Suburban Commons.*—By the Commons Act, 1876 (39 & 40 Vict. c. 56), sect. 8, Suburban Commons are defined as Commons situate either wholly or partly in any town or towns, or within six miles of any town or towns. Bye-Laws for the regulation and management of Suburban Commons may be made upon such application and under such order as is required for the making of Bye-laws in the case of other Commons, not being Metropolitan Commons, except that notice of every such application must, in the case of a Suburban Common, be served on the Urban Sanitary Authority or Authorities, having jurisdiction over such town or towns, who may appear at the inquiry to be held under the Act, and oppose such application: see sect. 8.

(iii.) *Other Commons.*—By the Commons Act, 1876, sect. 2, the Inclosure Commissioners (now the Board of Agriculture) may entertain an application, made in manner in this Act mentioned, for a provisional order for (*inter alia*) the regulation of a common. The term "regulation of a common" comprises for the purposes of the Act (*inter alia*) the following matters, that is to say, "the making or causing to be made Bye-Laws and Regulations for the prevention of, or protection from nuisances, or for keeping order on the common; and the general management of such common;

XV. Bye-laws for Regulation of Common.

virtue of the scheme [*or* provisional order] confirmed by the —— Act, 18—.

The term "unauthorised person" means and includes any person not for the time being authorised by the Conservators, other than a person acting by virtue and in due pursuance of some estate, interest, or right of a profitable nature in, over, or affecting —— Common, or some part thereof, and legally entitled so to act.

Words importing the masculine gender shall be deemed and taken to include females, and the singular number to include the plural, and the plural the singular.

As to deposit of rubbish.

2. It shall not be lawful for any unauthorised person to deposit rubbish or the like upon any part of —— Common.

As to deposit of other substances.

3. It shall not be lawful for any unauthorised person to deposit, have, or retain any heap of manure or dung, or any timber, bricks, or building or other materials upon any part of —— Common.

As to taking turf, &c.

4. It shall not be lawful for any unauthorised person to dig, cut, fell, sell, take, or remove any turf, sods, earth, loam, gravel, sand, clay, timber or other trees, brushwood, gorse, fern, or the like from any part of —— Common.

Regulations as to taking turf, &c., by authorised persons.

5. All persons who are, or may be authorised, or otherwise legally entitled to dig, cut, fell, or take any turf, sods, earth, loam, gravel, sand, clay, timber or other trees, brushwood, gorse, ferns, or the like from —— Common or any part thereof, shall in so doing abstain from committing any wanton or unnecessary damage to the said common, or the turf, trees, or other natural products thereof, and all such persons so

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and the appointment from time to time of Conservators of the common for the purposes aforesaid:" see sects. 3, 5.

The application may be made by "the persons interested in any Common:" sect. 9. The mode of procedure as to applications and the issue of provisional orders under the Act is regulated by sects. 9 to 14 of the Act. And by sect. 12 (10) no provisional order is to be of any validity until confirmed by Act of Parliament. By sect. 16 of the Act of 1876, "Any Bye-law made in pursuance of this Act, and any alteration made therein, and any revocation of a Bye-law, shall not be of any validity until it has been confirmed by one of her Majesty's principal Secretaries of State."

See, as to providing for the expenses of the regulation of Commons the Commons Expenses Act, 1878 (41 & 42 Vict. c. 56). See further, on the question of the regulation and management of Commons, Chambers' Local Government Law, sub tit. "*Digest of the Law of Commons.*"

XV. Bye-laws for Regulation of Common.

authorised or entitled shall observe and abide by the following regulations, that is to say :—

(i.) No turf, sods, earth, loam, gravel, sand, clay, timber or other trees, brushwood, gorse, fern, or the like shall be dug, cut, felled, or taken on or from any part of —— Common which may for the time being be set apart or appropriated by the Conservators, for the better preservation of the herbage thereon, or for cricket or other reasonable recreation, if similar turf or other respective substances or products as aforesaid can be conveniently dug, cut, felled or taken on or from some other part of the said Common.

(ii.) No fresh or new gravel or other pit or excavation shall at any time be opened or made on the said Common, if the purposes for which such pit or excavation is required can be conveniently answered by means of some pit or excavation for the time being already existing on the said Common.

(iii.) All gravel and other pits and excavations shall, as far as possible, be made with sloping sides, so as to prevent accidents to animals or persons straying or falling therein; and where not so sloped shall be securely fenced by the persons making such pit or excavation.

(iv.) In making or enlarging any gravel or other pit or excavation the mould or upper layer of soil shall, as far as circumstances will permit, be preserved, and shall from time to time be spread or replaced in a workmanlike manner by the persons making or using such pit or excavation, or such parts thereof as they shall have exhausted or shall no longer require for the supply of gravel or other substances, so as to promote as far as possible the restoration of the herbage.

As to injury to turf, &c.

6. It shall not be lawful for any unauthorised person in any wise to injure, damage, or destroy any turf, gorse, fern, grass, brushwood or trees upon —— Common or any part thereof, or to dig upon or in, or break up, or disturb the surface of the said common or any part thereof or of any gravel or sand pit thereon, or to light any fire on the said Common.

As to grazing cattle, &c.

7. It shall not be lawful for any unauthorised person to turn out on —— Common or any part thereof any cattle,

sheep, swine, horse, ass, mule, turkeys, geese, ducks, fowls, or other animals (whether commonable or not), or knowingly to permit any such animals to graze or feed or remain thereon.

As to tents, booths, &c.

8. It shall not be lawful for any unauthorised person to encamp upon —— Common or to erect or place thereon any hut, tent, booth, stand, posts, rails, poles, fences, or any other building or erection of any kind whatsoever, or to cause any obstruction on the said common.

As to picnics and meetings.

9. It shall not be lawful for any unauthorised person to give, attend, or to be present at any picnic or other pleasure party of more than twenty persons, or to hold, attend or be present at any meeting or assemblage whatever of more than twenty persons on —— Common.

As to injury to notices, &c.

10. It shall not be lawful for any unauthorised person to remove, injure, or deface any notices or notice boards, gates, fences, barriers, posts, seats, or other matters or things erected or placed on the said common by authority of the Conservators, or to post or affix any bills, placards, or notices thereon.

As to drying, bleaching, &c.

11. It shall not be lawful for any unauthorised person to use —— Common or any part thereof as a drying or bleaching ground, or for shaking or beating carpets thereon.

As to hire of horses, &c.

12. It shall not be lawful for any unauthorised person to let or hire on the said common any horse, pony, mule, ass, or goat.

As to laying sewers, &c.

13. It shall not be lawful for any unauthorised person to construct or lay any sewer, drain, pipe, or waterway, or any matter or thing of a like nature, on, into, or under the said common or any part thereof; or to make or form any new roads over or across the same; or to commit or make any trespass or encroachment whatever on any part of the said common (*b*).

(*b*) By sect. 30 of the Commons Act, 1876, the County Courts are given jurisdiction as regards any encroachment or illegal inclosure of a common or any nuisance impeding any right of common.

And by sect. 31 of the same Act, any person intending to inclose a common or part thereof otherwise than under the Act is to give to all persons interested three months' previous notice of such intention.

The provisions are now extended to Metropolitan Commons: *vide supra.*

XV. Bye-laws for Regulation of Common.

As to appointment of parts of common for cricket, &c.

14. It shall be lawful for the Conservators from time to time to set apart and appropriate any part or parts of —— Common for the better preservation of the herbage thereon, or for cricket, or other reasonable recreation; and it shall not be lawful for any unauthorised person to ride, drive, or pass with any horse, pony, ass, mule, waggon, cart, van, truck, or carriage of any description in, upon or over the part or parts so set apart and appropriated of the said Common.

Prohibition of other acts:

15. It shall not be lawful for any person on —— Common or any part thereof, to commit, do, aid, or abet in any of the matters or things which are prohibited by the following regulations, that is to say:—

gambling;

(i.) Gambling, betting, or playing with cards or dice.

bird-catching, &c.;

(ii.) Bird-catching, bird-trapping, taking birds' nests or eggs, shooting or chasing birds, game, or other animals.

endangering or annoying the public;

(iii.) Throwing stones, or sticks, or other missiles, or doing anything which may endanger or be or grow to be to the hurt, damage, nuisance, annoyance, or inconvenience of the persons using or frequenting the said Common, or entitled to use or frequent the same.

brawling;

(iv.) Brawling, fighting, quarrelling, cursing, swearing, or using indecent or improper language, or being otherwise disorderly, or wilfully doing any act which violates public decency.

obstructing cricket and other games;

(v.) Wilfully interfering with, obstructing, or annoying any persons who are playing or engaging in, or have made preparations for playing or engaging in cricket or other reasonable games or recreations on any part of the said Common set apart and appropriated for such purpose.

interfering with officers in execution of their duty.

(vi.) Assaulting or resisting or inciting to assault or resist any constable or other officer of the Conservators or other person in the execution of his duty, or the lawful exercise of his authority under any statute for the time being in force relating to commons or open spaces, or these or any Bye-laws for the time being in force relating to —— Common.

Penalties (*c*).

16. Every person acting, taking part in, aiding, or abetting

(*c*) As regards Commons, other than Metropolitan Commons,

XV. **Bye-laws for Regulation of Common.**

in the violation of any of the foregoing Bye-laws or regulations, shall, for every such offence, be liable to a penalty not exceeding ——, and in the case of a continuing offence, every person so continuing such offence shall be liable to a further penalty not exceeding the sum of —— for each day after written notice of the offence, during which the offence continues.

Jurisdiction of justices.

17. The Justices before whom any of the penalties aforesaid is or are sought to be recovered shall be at liberty in every case to order that part only of the maximum penalty shall be paid.

Apprehension of offenders.

20. All persons found disturbing the public peace and also all persons committing any offence against any such Act of Parliament or Bye-law are liable to immediate apprehension without warrant, so that they may be dealt with according to law.

Saving of powers of police and other authorities.

21. Nothing in these Bye-laws shall interfere with the powers of the Police or any other authority legally existing for preventing or punishing offences or with the powers of the County Council as having the control over the common, pursuant to the —— Act before referred to or otherwise.

User for military purposes.

22. Notwithstanding anything herein contained, it shall be lawful for the Conservators from time to time to grant to Her Majesty's Military forces, Regular or Auxiliary, the user of —— Common or any part thereof subject to such restrictions, conditions, and arrangements as to time, place, area, compensation for damage, and other matters as may be mutually agreed upon between the Conservators and the Secretary of State for War or other competent Military Authority for all or any of the following purposes; that is to say,

(i.) Military Drill and exercises;

(ii.) Encampment;

(iii.) Reviews.

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pecuniary penalties may be imposed by Bye-laws made under the Commons Act, 1876, recoverable summarily before any two justices, but not exceeding for any one offence the sum of 40*s.*: see sect. 8 of that Act.

XVI. *PRESENTATION TO A BENEFICE* (*d*).

XVI. Presentation to Benefice.

TO THE RIGHT REVEREND FATHER IN GOD [*bishop*], by Divine permission Lord Bishop of ——, or to his Vicar general or spiritual, or to any other person having or that shall have sufficient authority in this behalf:—

Presentation.

I [*patron*] of, &c., the patron of the advowson of the rectory of the parish church of ——, in the county of ——, and diocese of —— aforesaid, DO HEREBY PRESENT to your Lordship, and to the rectory of —— aforesaid, now become vacant by the death of the Reverend [A.B.], clerk, the last incumbent thereof, and to my presentation in full right belonging, the Reverend [C.D.], clerk, Master of Arts, now of, &c., humbly praying that your Lordship will be graciously pleased to admit and institute him to the said rectory, and to invest him with all its rights, members and appurtenances, and cause him to be inducted into the same, and to do and execute all other things which shall appertain to your Lordship's episcopal office in this behalf.

IN WITNESS, &c.

Writing, whether necessary to presentation.

(*d*) The question of the right to presentation to benefices is fully considered, *ante*, sub tit. "AGREEMENTS," Vol. I., pp. 459 *et seq.* Formerly it was considered that the nomination and presentation to a benefice by a patron could be effected by parol declaration in the presence of the ordinary; but if the right of presentation was vested in a corporation, it was necessary that the presentation should be made in writing under the common seal of the corporation. In more recent times, however, presentations were by several successive Stamp Acts, and ultimately by the Stamp Act, 1870 (33 & 34 Vict. c. 97), subjected to stamp duty, and, therefore, as it would seem, impliedly required to be in writing, and presentations are now usually made in writing. The stamp duties on presentation have been abolished by the stat. 40 & 41 Vict. c. 13, s. 13.

Resignation bonds.

A form of Resignation Bond will be found *ante*, sub tit., "BONDS," Vol. II, at p. 366; and the law on the question as to the validity of such instruments is discussed at p. 314 *et seq.* in the same volume.

XVII. *FARMING LEASE by an* INCUMBENT *with the* CONSENT *of the* PATRON *of the* BENEFICE *and the* BISHOP *of the* DIOCESE, *of* LANDS *belonging to the* BENEFICE *under the Stat.* 5 & 6 *Vict. c.* 27 (*e*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the Reverend [*incumbent*], clerk in holy Parties.

(*e*) The subject of leases by Ecclesiastical Corporations, aggregate and sole, is discussed at some length in the Dissertation on "Leases," *ante*, Vol. III., pp. 52 *et seq.*; but no precedents of such leases are given in that volume. It may be useful in this place to supply that omission, and in the notes to this and the next following Precedent to notice a few further points relating to such leases.

The above Precedent closely follows the provisions of sect. 1 of the Stat. 5 and 6 Vict. c. 27 (as to which see *ante*, Vol. III., p. 54), enabling an incumbent, with the consent of the patron and bishop, to grant farming leases for 14 years, or for 20 years where the lessee enters into special covenants with regard to the cultivation or improvement of the demised lands as therein mentioned. If the lands proposed to be leased are of copyhold or customary tenure, the consent of the lord of the manor will also be required.

This Act applies only to farming leases. And by sect. 2 the parsonage house and offices and ten acres of glebe, situate most conveniently for occupation therewith, are (except as regards glebe lands situate 5 miles or upwards from the parsonage house), not to be leased under the Act. Sect. 3 of the Act provides that before a lease is granted a surveyor shall be appointed by the bishop, patron, and incumbent, by writing under their respective hands, who shall make maps, certificates, valuation, and reports respecting such intended lease, and any buildings, works or improvements proposed to be erected, constructed or made by the lessee, and in this case he is to certify that the proposed covenants for these purposes are proper covenants, and the amount by which the rent may properly be diminished on account of such covenants.

The lessee must execute a counterpart of the lease: sect. 1; and such counterpart, and all maps, certificates, valuations, and reports, are, within 6 months after the date of the lease, to be deposited in the bishop's registry; but the deposited documents are to be produced to the incumbent or patron on application, and office copies given, which are to be admitted as evidence of such instruments in all Courts: sect. 14. This Act does not restrict the powers of leasing which incumbents formerly possessed: *Green* v. *Jenkins*, 1 De G. F. & J. 454. See as to such powers, *ante*, Vol. III., pp. 52 *et seq.*

Deans and chapters and other ecclesiastical corporations aggregate had formerly power to grant leases of their lands for terms not exceeding twenty-one years or three lives, reserving the ancient and accustomed rent; but now by sect. 9 of the stat. 31 & 32

XVII. Farming Lease by an Incumbent.

orders, rector of the parish of ——, in the county of ——, of the first part; [*patron*] of, &c., the patron of the said rectory or benefice, of the second part; the Right Reverend William, Bishop of ——, of the third part; and [*lessee*] of, &c., of the fourth part: WITNESSETH that, in consideration of the rent, covenants and conditions, hereinafter reserved and contained, and by or on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid, performed, and observed respectively, the said [*incumbent*], with the consent of the said [*patron*] as such patron as aforesaid, and of the said [*bishop*], as bishop of the diocese of —— aforesaid wherein the said rectory or benefice is locally situated (testified by their respective execution of these presents), hereby demises unto the said [*lessee*], his executors, administrators, and assigns; ALL THAT farm-house, farm and lands called &c., situate in the parish of —— aforesaid, and forming part of the glebe lands of the said rectory or benefice, with the cottages, and all appurtenances thereto belonging, which premises contain together —— acres or thereabouts, and consist of the several buildings, closes, and fields mentioned in the first schedule hereto, TO HOLD the same unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— 18—, for the term of fourteen [*or* twenty] years thence next ensuing; EXCEPT and always reserving for the use of the said [*incumbent*] and his successors, all timber and other trees and all saplings and underwoods, and all mines and minerals, except as is hereinafter provided; YIELDING and PAYING therefor every year, and so

Testatum.

Demise of lands specified in first schedule.

Habendum.

For fourteen or twenty years.

Reservation of timber, minerals, &c.

Reddendum (*f*).

Vict. c. 114, s. 9 (set out *ante*, Vol. III., p. 59), re-endowed deans and chapters cannot demise otherwise than from year to year or for a term not exceeding twenty-one years in possession, and the best rent reasonably obtainable without fine must be reserved: moreover, the lessee must not be made dispunishable for waste, and every such lease must contain the like covenants, conditions, and reservations, with or for the benefit of the dean and chapter, as are required in the case of a lease by an incumbent under sect. 1 of the stat. 5 & 6 Vict. c. 27, or as near thereto as circumstances will permit. In such a capitular lease the only parties will be the dean and chapter of the one part and the lessee of the other part, no consent being required.

(*f*) In leases under this Act the rent reserved must be payable quarterly, and must be the best and most improved rent that can

XVII. Farming Lease by an Incumbent.

in proportion for any less term than a year, during the said term, the rent of £ ——, without any deduction, except for landlord's property tax, by equal quarterly payments to be made on the usual quarter days in every year; AND THE SAID [*lessee*] hereby covenants with the said [*incumbent*], that the said [*lessee*], his executors, administrators, and assigns, will duly pay the said yearly rent hereby reserved, at the times and in manner hereinbefore mentioned, and all taxes, charges, rates, assessments, and impositions whatever (except landlord's property tax) which shall be payable in respect of the premises hereby demised; AND FURTHER, that the said [*lessee*], his executors, administrators, or licensed assigns, will not assign or underlet the said demised premises, or any part thereof, for all or any part of the term hereby granted, without the consent of the bishop of the diocese of —— aforesaid for the time being, and the patron and incumbent for the time being of the said rectory or benefice of ——, to be testified by their respectively being parties to, and sealing and delivering the deed or instrument by which any assignment or underlease of the same premises or any part thereof may be affected; AND FURTHER that he, the said [*lessee*], his executors, administrators, and licensed assigns, will, during the said term, occupy and till the premises, &c., [*here insert any special stipulations as to cultivation and management of the farm*, see *ante*, Vol. III., pp. 348, 360, 366, 376, 387]; And will in all respects cultivate and manage the said demised premises according to the most improved system of husbandry in that part of the country where such premises are locally situated, so far as such system may not be inconsistent with the express covenants and stipulations hereinbefore contained as to the cultivation and management of the same premises; AND that he, the said [*lessee*], his executors, administrators, and licensed assigns, will at all times during the continuance of the said term, keep, and at

Covenants by lessee: to pay rent, taxes, &c.;

not assign or underlet without licence;

to cultivate and manage farm properly;

to repair;

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reasonably be obtained, without taking any fine, foregift, premium or other consideration for granting the lease; but covenants by the lessee to use any particular system of cultivation or drainage, or to embank or warp (where required), or to erect farm buildings, or put in repair buildings, or make substantial improvements, or for the reservation or payment of any additional rent or rents, or penalty on breach of any of the covenants in the lease, are not to be deemed to be a fine, &c.

XVII. **Farming Lease by an Incumbent.**

the end of the term leave, all the said demised premises, together with the gates, drains, and fences of every description, and other fixtures and things thereupon, or belonging thereto, in good and substantial repair and condition; And will, at all times during the continuance of the said term, keep all buildings upon the said premises or to be erected during the said term thereon or on any part thereof insured against damage by fire, in the joint names of him the said [*lessee*], his executors, administrators, or licensed assigns, and of the incumbent of the said rectory or benefice for the time being, in three-fourths at the least of the value thereof; And will lay out the money to be received by virtue of any such insurance, and all such other sums as shall be necessary, in substantially rebuilding, repairing, and reinstating, under the direction of a surveyor to be for that purpose appointed by the incumbent of the said rectory or benefice for the time being, and the said [*lessee*], his executors, administrators, or licensed assigns, by writing under the respective hands, such messuages or buildings as shall be destroyed or damaged by fire; [Provided always, and the said [*lessee*] hereby further covenants with the said [*incumbent*] and his successors, that in consideration of the said term of twenty years hereinbefore granted to him the said [*lessee*], at the rent, and subject to the covenants on his part and conditions hereinbefore contained, he the said [*lessee*], his executors, administrators, and licensed assigns, will within —— calendar months from the day of —— the date of these presents, in a good, sound, substantial, and workmanlike manner, and with fit and proper materials of all kinds, to be approved by the architect or surveyor of the said [*incumbent*] or his successors, and to his satisfaction, erect, build, and complete on the said demised premises the several buildings, works, and improvements particularly specified in the second schedule hereunder written; And will pay and discharge the said architect's or surveyor's fees of £5 per cent. on the expenditure for superintending and directing the same; Provided always and it is hereby agreed that the said [*lessee*], his executors, administrators, or licensed assigns, shall be entitled to have or take brick-earth, stone, lime, or other materials for the erection, building, and construction of the said buildings, works, and improvements specified in the second schedule hereunder written, or any of them, or from time

to insure buildings;

to apply insurance monies in restoring buildings.

Covenant by lessee to execute improvements specified in the second schedule.

Proviso that lessee shall be allowed to take brick-earth and other materials for works and repairs.

XVII. Farming Lease by an Incumbent.

to time, with the consent and subject to the approval of the said [*incumbent*], or his successors, or their or his agent duly authorised for the construction or repair of drains, or any other necessary improvements on the said demised premises, and also sufficient rough timber to be assigned by the said incumbent or his successors, or by his or their agent duly authorised for any of the purposes aforesaid, or for the repair of gates and fences;] PROVIDED ALWAYS and it is hereby agreed and declared, that, &c. [*Insert here any stipulations as to last year of the term and tenant's compensation, see ante*, Vol. III., pp. 352, 362, 366, 373, 379, 383, and 387]; And the said [*incumbent*] hereby covenants with the said [*lessee*] that the said [*lessee*] paying the rent hereby reserved as and when the same shall become payable, and performing the covenants and conditions on his part herein contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted without any interruption or disturbance from or by the said [*incumbent*] or his successors; PROVIDED ALWAYS, that in case the rent hereby reserved or any part thereof shall be unpaid for the space of twenty-one days next after the same shall become due, or in case the said lessee, his executors, administrators, or licensed assigns, tenants or occupiers for the time being of the said demised premises, shall be convicted of felony, or shall become bankrupt, or take the benefit of any act or acts of parliament, if any, for the time being in force for the relief of insolvent debtors, or shall compound his debts or assign over his or their estate and effects for payment thereof, or in case any execution shall issue against him or them or his or their effects, or in case he or they shall not from time to time duly observe and perform all the covenants and agreements on his and their part herein contained, then and in any of the said cases it shall be lawful for the said [*incumbent*], or his successors for the time being, to re-enter upon the said demised premises or any part thereof in the name of the whole, and upon such entry the said term hereby created shall absolutely cease and determine, but without prejudice to any right of the said [*incumbent*] or such successor against the said [*lessee*] or other

Provisoes as to rights of parties on determination of term (*g*).

Covenants by lessor for quiet enjoyment

Power of re-entry.

(*g*) The custom of the country as to outgoing tenants applies to every lease granted under this Act, except so far as the lease contains any stipulations to the contrary: see sect. 3.

XVII. Farming Lease by an Incumbent.

the tenant or occupier for the time being of the said demised premises by way of distress or otherwise, under or by way of virtue of these presents.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

XVIII. *BUILDING LEASE by an* INCUMBENT, *with the* CONSENT *of the* PATRON *of the Benefice and of the* ECCLESIASTICAL COMMISSIONERS, *of* LAND *belonging to the* BENEFICE *under the* ECCLESIASTICAL LEASING ACTS, 5 *&* 6 *Vict. c.* 108, *and* 21 *&* 22 *Vict. c.* 27 (*h*).

Parties.

THIS INDENTURE (*i*), made the —— day of ——, 18—, BETWEEN the Rev. [*rector*], of, &c., clerk in holy

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Ecclesiastical Leasing Acts.

(*h*) By the Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), sect. 1, ecclesiastical corporations, aggregate and sole (as to which see *ante*, Vol. III., p. 56), are empowered to grant building leases for any term not exceeding ninety-nine years, to take effect in possession, with certain consents, and subject to certain restrictions.

Consents.

By sect. 20 of this Act it is provided that every lease granted thereunder shall be made with the consent of the Ecclesiastical Commissioners, and, if made by the incumbent of a benefice, with the consent of the patron thereof; and every such lease of lands of copyhold or customary tenure made by any ecclesiastical corporation, either aggregate or sole, generally requires also the consent of the lord of the manor. The required consents are to be testified by the consenting parties being parties to and executing the lease: sect. 21. Corporations aggregate are to execute by their common seal: sect. 27. The execution of a lease by the consenting parties

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(*i*) Stamps, *ad valorem*, as a conveyance by way of sale in respect of the premium: see *ante*, Vol. V., p. 369; and *ad valorem* as a lease in respect of the full rent reserved: see *ante*, Vol. V., p. 336. The counterpart must bear a stamp of 5*s*.

orders, rector of the parish church and benefice of ——, in the county of ——, of the first part; [*patron*], of, &c.,

is to be conclusive evidence that the requirements of the Act have been complied with: sect. 7.

Extent of Acts.

This Act, and the amending Act of 1858 (21 & 22 Vict. c. 27), extend only to England, Wales, the Isle of Man, and the Channel Islands.

Fines and premiums.

By sect. 30 of the Act of 1842 it was provided that the payment of any fine or premium should avoid the lease. But this restriction is removed by the amending Act of 1852, which provides (sect. 1) that leases under the former Act may be granted in consideration of fines, &c., where it shall be made to appear to the satisfaction of the Commissioners that lands may be so leased to the permanent advantage of the estate and endowments belonging to the leasing corporation, and with the approval of the Commissioners. The words within leaded brackets in the above Precedent (pp. 857 *et seq.*) will be omitted where it is not intended that a premium is to be paid.

Payment of fines, &c.

All monies payable by way of fine, &c., are to be paid to the Commissioners. The receipt of their treasurer is to be a sufficient discharge for the consideration for any property *sold* under the Act of 1858 (which contains also powers to sell ecclesiastical lands); and it is in practice presumed that this provision applies also to money payable by way of fine, &c.; but it may be well also to insert in the body of the lease an express acknowledgment by the Commissioners of the receipt of the money: see sect. 2 of the Act of 1858; or the Commissioners may allow such money or part thereof to remain on mortgage of the premises so leased: ibid.

Increased value of benefice.

Where by any lease under the Acts the value of a benefice is improved so as to exceed 600*l.* per annum where the population amounts to 2000, or 500*l.* where the population amounts to 1000, or 300*l.* per annum in any other case, the excess is to be paid to the Commissioners: see sect. 13 of the Act of 1842, and sect. 10 of the Act of 1858.

Investment of premium monies.

All monies so received by the Commissioners are to be laid out by them, at such time as they shall think fit, in the purchase of lands and hereditaments to be conveyed so as to vest in the corporation on whose behalf the monies have been received; and until so laid out are to be invested in the names of the Commissioners in the public stocks or funds, and the dividends of such investments are to be paid to the person or persons who would have been entitled to the rents and profits of the purchased hereditaments if the purchase had been made: see sect. 2 of the Act of 1858.

Rent.

By sect. 9 of the same Act it is provided that no lease is to be granted of land acquired under the Act except at the best annual rent which can be reasonably obtained without fine.

Covenants and provisions.

As regards the covenants and provisions proper to be inserted in leases under the Ecclesiastical Leasing Acts, the Precedent in the text closely follows the form prescribed by those Acts. "But every such lease may also contain any other covenants, provisions

XVIII. Building Lease under Ecclesiastical Leasing Acts.

the patron of the said rectory or benefice, of the second part; the Ecclesiastical Commissioners for England (herein-

conditions, agreements, and restrictions which shall appear reasonable to the lessor for the time being, and the person or persons whose consent is hereby declared to be essential to the validity of such lease, and particularly any provision for apportioning the rent to be reserved by any lease made under this power, and for exonerating any part of the lands or houses to be comprised in any such lease from the payment of any specified portion of the whole rent to be thereby reserved:" sect. 1 of the Act of 1842.

Counterparts. The lessee must execute a counterpart of the lease: ibid. And every such counterpart, and every map, plan, statement, certificate, valuation and report relating thereto are, within six calendar months after the date of the lease, to be deposited with the Commissioners, and to be open to inspection to the leasing corporation and the patron and persons applying to inspect the same on their behalf respectively; and office copies of such deposited instruments are to be received as evidence in all Courts: sect. 29 of the Act of 1842.

Costs. The lessor's expenses of and incident to any lease under the Ecclesiastical Leasing Acts may, with the approval of the Commissioners, be charged upon the lands of the leasing corporation.

Surrender of existing leases. Leases under the Ecclesiastical Leasing Acts may be made on the surrender of existing leases; and it is not necessary to surrender under-leases (4 Geo. 2, c. 28, sect. 6) before the grant of such leases under these Acts. See also stat. 8 & 9 Vict. c. 106, s. 9, set out. *ante*, Vol. III., p. 300.

Lease of water-leaves, &c. By sect. 4 of the Act of 1842, ecclesiastical corporations, aggregate and sole, are empowered, with the consents above mentioned, to grant by deed leases of water-leaves, way-leaves, and other easements, liberties, licences and powers for any term not exceeding sixty years, to take effect in possession. Every such lease is to contain a power of re-entry on non-payment of rent within a reasonable time to be therein specified, and any reservations, covenants, and provisions which may be thought expedient; and the lessee must execute a counterpart of the lease.

Mining leases. By sect. 6 of the same Act ecclesiastical corporations, aggregate and sole, are empowered with the required consents to grant leases "for any term not exceeding sixty years, to take effect in possession, and not in reversion or by way of future interest, any mines, minerals, quarries or beds belonging to such corporation, together with the right of working or of opening and working the same, and of working any adjacent mine by way of outstroke or other underground communication, and together also with such portion of land belonging to such corporation, and all such rights and liberties of way and passage, and other rights, easements, and facilities for the opening and working of all such mines, minerals, quarries or beds, and leading and carrying away the produce thereof, or otherwise incident to mining operations as shall be deemed expedient; and every such lease shall contain such reservations by way of rent, royalty, or share of produce in kind, all or any thereof, or otherwise, and such powers, provisions, restrictions, and covenants, as

XVIII. Building Lease under Ecclesiastical Leasing Acts.

after called "the said commissioners"), of the third part; and [*lessee*], of, &c., of the fourth part; [WHEREAS the said incumbent as such rector as aforesaid is seised of or entitled to among other hereditaments the pieces or parcels of land and hereditaments hereinafter described and hereby demised, and has under the powers enabling him in this behalf contained in the Ecclesiastical Leasing Acts, with the consent and approval of the said Commissioners, and with the consent of the said [*patron*], as such patron as aforesaid testified in manner hereinafter mentioned, agreed with the said lessee to demise to him the same pieces or parcel of land and hereditaments for the term and in manner hereinafter appearing: AND WHEREAS it has been made to appear to the satisfaction

Recitals.

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shall be approved by the Ecclesiastical Commissioners for England, due regard being had to the custom of the country or district within which such mines, minerals, quarries, or beds are situate. By sect. 14 it is provided that such portion not more than three-fourths, nor less than a moiety of any improved value, under a mining lease so granted, as the Commissioners shall think fit, is to be paid to the Commissioners, to be held by them in manner directed as regards other moneys payable to them under these Acts; and the remainder of the improved value is to be deemed an improvement within the meaning of sect. 13 relating to benefices (see *supra*), and the similar provisions of sects. 10, 11, and 12 relating to the incomes of archbishops, bishops, deans and canons, and archdeacons.

Form of lease.

It will be seen from the above remarks that a mining lease granted under these Acts is not required to be according to any special form, or to contain any specified covenants or provisions. Such a lease will not, therefore, differ from an ordinary mining lease, except as regards the parties, the introductory recitals, if any, and the operative part, which may be adapted without difficulty from the above Precedent of a building lease. For forms of mining leases adapted to the customs of various districts, see *ante*, Vol. III., pp. 486 *et seq.*

Consent of patron.

Where a perpetual curate granted a mining lease with the consent only of the immediate patron, but not of the patron of the advowson, it was held that the lease was absolutely void, and that the acceptance of rent by the curate's successor merely created a tenancy from year to year: *Doe* v. *Collinge*, 7 C. B. 989; see *Pennington* v. *Cardale*, 3 H. & N. 656.

Houses of residence, &c., not to be leased.

No lease can be granted under these Acts of any house of residence of any corporation sole, or of any corporation aggregate or any member thereof, or of any buildings, gardens, or pleasure-grounds adjoining or appurtenant thereto or necessary or convenient to the occupation thereof, nor any lease of any mines, &c., or easements which might be prejudicial to the enjoyment of such houses of residence: see sect. 9 of the Act of 1842.

XVIII. **Building Leases under Ecclesiastical Leasing Acts.**

of the said Commissioners that the said pieces or parcels of land and hereditaments hereby demised, may to the permanent advantage of the estate and endowments belonging to the said benefice, be leased in consideration partly of the premium hereinafter mentioned, and partly of the several rents hereby reserved for the term, and under and subject to the covenants, stipulations, conditions, and agreements, on the part of the lessee and in the manner hereinafter expressed: NOW THIS INDENTURE] WITNESSETH that, [in pursuance of the said agreement and in consideration of the premium or sum of £ —— now paid by the said lessee to the account of the said Commissioners at the Bank of England, as appointed by them in that behalf (the receipt of which sum is intended to be acknowledged by a memorandum endorsed on these presents, and is also hereby acknowledged by the said Commissioners, And also] in consideration of the rent hereinafter reserved, and of the covenants, stipulations, agreements, and conditions on the part of the lessee hereinafter contained, the said [*incumbent*], with the consent and approval of the said Commissioners testified by their being parties to these presents and affixing thereto their common seal, and also with the consent of the said [*patron*], as such patron as aforesaid testified by his being a party to and executing these presents, hereby demises unto the said [*lessee*], his executors, administrators, and assigns, all and singular the pieces or parcels of land, &c., [*describe parcels*]: To HOLD the same premises unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of ——, 18—, for the term of 99 years thence next ensuing: YIELDING and PAYING therefor yearly during the said term and so in proportion for any less term than a year, the rents following, that is to say, during the first —— years of the term hereby created the rent of £ ——, and thenceforth during the residue of the said term, in addition to the said yearly rent of £ ——, the further or increased yearly rent of

Testatum.

Demise.

Habendum, for ninety-nine years.

Reddendum (*k*).

(*k*) By sect. 2 of the Act of 1842 it is provided that a *small* rent may be reserved for not more than six years from the commencement of the term, and thereafter an additional increased rent may be reserved; or the increased rent may be made payable at any time not exceeding such six years, when a stipulated progress shall have been made with the buildings, &c. The rent or rents may be made payable half-yearly or oftener.

£ ——, such rents to be paid clear of all present and future taxes, charges, rates, assessments, and impositions whatsoever, (except landlord's property tax), by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year, the first half-yearly payment of the said yearly rent of £ —— (*small rent*) to be made on the —— day of ——, 18—, and the first half-yearly payment of the said yearly rent of £—— (*increased rent*), to be made on the —— day of ——, 18—, And the said lessee hereby covenants with the said [*incumbent*] in manner following [*here insert covenant to build, complete and finish a house on the demised premises, ut ante*, Vol. III., p. 412, *and any other covenants, conditions and provisions which may appear reasonable in relation thereto, see ante*, Vol. III., pp. 391, 395, 404, 418, and 421]; AND FURTHER that he the said [*lessee*], his executors, administrators, and assigns, will pay the several rents hereinbefore reserved at the times and in manner appointed for payment of the same respectively; And also all taxes, charges, rates, assessments, and impositions whatsoever (except landlord's property tax), which now or at any time hereafter shall affect the said demised premises or any part thereof: AND ALSO will keep the said house [*or* houses] and buildings so to be erected on the said demised premises as aforesaid insured from damage by fire to the amount of four-fifths at least of the value thereof in the office of the —— Fire Insurance Society; And will lay out the money received by virtue of such insurance, and also all such other sums as shall be necessary in rebuilding, repairing and reinstating the said house [*or* houses] and buildings or such of them as shall be destroyed or damaged by fire: AND ALSO will surrender the possession of and leave in good and tenantable repair the said house or houses and buildings to be so erected as aforesaid on the expiration or sooner determination of the said term hereby granted: AND ALSO will within 21 days after any assignment of this present lease shall be made, deliver a copy of such assignment to the said incumbent or his successor for the time being; PROVIDED ALWAYS that it shall be lawful for the said incumbent or his successor for the time being, and their respective surveyors and agents from time to time to enter upon the demised premises and inspect the condition thereof, AND THE SAID [*incumbent*] hereby covenants with the said [*lessee*], &c. [*covenant for quiet enjoy-*

Lessee's covenants: to build;

to pay rents, taxes, &c.

to insure buildings;

to yield up at end of term in good repair;

to give notice of assignments.

Power for lessor to inspect premises.

Lessor's covenant for quiet enjoyment.

XVIII. **Building Leases under Ecclesiastical Leasing Acts.**

ment, ante, p. 853]; PROVIDED ALWAYS that if such of the yearly rents hereby reserved as shall for the time being be payable shall be unpaid in the whole or in part by the space of 21 days next after the days of payment on which the same ought to have been paid as aforesaid whether such payment shall have been legally demanded or not, or if default shall be made in the observance or performance in any of the covenants, provisoes and conditions on the part of the lessee herein contained then, &c. [*continue proviso for re-entry, ut ante*, p. 853]; PROVIDED, nevertheless, that no breach of any of the covenants, provisoes and conditions herein contained, except the covenant for payment of the said rents, and the covenants for building, erecting, completing, and finishing the said house [*or* houses] and buildings, in manner aforesaid, shall occasion any forfeiture of this present lease, or of the term hereby granted, or give any right of re-entry, unless or until judgment shall have been obtained in an action for such breach of covenant, nor unless the damages and costs to be recovered in such action shall have remained unpaid for the space of three calendar months after judgment shall have been obtained in such action.

Power of re-entry.

Qualifying proviso against forfeiture (*l*).

IN WITNESS, &c.

XIX. *REVOCATION of a* VOLUNTARY SETTLEMENT, *and* DECLARATION *of* NEW USES *or* TRUSTS (*by Endorsement on the Settlement*) (*m*).

Revocation.

KNOW ALL MEN BY THESE PRESENTS (*n*) that I the within-named [*settlor*] hereby in exercise of the power in this behalf reserved to me by the within-written indenture and of every

(*l*) A lease under these Acts may be made either with or without this proviso. Compare the provisions as regards restrictions on and relief against forfeiture of leases generally contained in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 14; and see *ante*, Vol. III., pp. 255 *et seq.*

(*m*) The words in brackets will be used where the settlement is of real estate, whether settled or trust, for sale or otherwise.

(*n*) Stamp, 10*s*.

other power, if any, me hereunto enabling, hereby revoke all the [uses], trusts, powers, and provisions [limited] declared and contained by and in the said indenture concerning the trust funds [*or* hereditaments] thereby settled and the [rents, profits and] income thereof, and declare that the same [uses], trusts, powers, and provisions shall henceforth be void and of no effect; AND I hereby further declare and appoint that the said trust funds [*or* hereditaments] and the [rents, profits and] income thereof shall henceforth be held by the within-named [*trustees*] [and their heirs] IN TRUST for [*or* TO THE USE of] myself the said [*settlor*] absolutely [*or* in fee simple] for my own use and benefit (*o*).

XIX. **Revocation of Settlement.**

Declaration of use or trust.

IN WITNESS, &c.

XX. *CONVEYANCE by way of* SALE *of* LAND *to the* TRUSTEES *of a* SOCIETY *of* PROTESTANT DISSENTERS, *for the purposes of a* CHAPEL *and* SCHOOL (*p*).

THIS INDENTURE (*q*), made the —— day of ——, 18—, BETWEEN [*vendor*] of, &c., of the one part, and [*names*, Parties.

(*o*) If a succession of new uses or trusts is to be appointed, say,—

"And I hereby further declare and irrevocably appoint that the said trust funds [*or* hereditaments], &c., shall henceforth be held, &c., UPON THE TRUSTS [*or* TO THE USES, upon the trusts], and with and subject to the powers and provisions hereinafter declared and contained concerning the same, that is to say," &c. [*continue as the case may require*].

Declaration of successive uses or trusts.

(*p*) The conveyance and declaration of trusts of land for purposes of the public worship of a dissenting religious body may be

(*q*) Stamp *ad valorem* as a conveyance on sale, see *ante*, sub tit. "PURCHASE DEEDS," Vol. V., pp. 369 *et seq.*

XX. Conveyance of Land for a Chapel.

addresses and descriptions of trustees], of the other part: [WHEREAS the said [*vendor*] is seised of or otherwise entitled to the piece or parcel of land and hereditaments hereinafter described and hereby granted for an estate in fee simple free from incumbrances, and has agreed to sell the same, but subject to the reservations and upon the trusts hereinafter con-

Recital of vendor's seisin (*r*) and agreement for sale.

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effected either by two separate deeds, the first conveying the land, and the second reciting the first and declaring the trusts of the land, or, as in the Precedent in the text, by a single deed. The deed declaring the trusts must in either case be enrolled: see *infra*. Except where the state of the grantor's title renders necessary lengthy recitals, or where the conveyance is made subject to elaborate reservations or covenants and provisions as to building or otherwise, there seems to be no great saving of expense or other advantage in declaring the trusts by a separate instrument.

On the occasion of a conveyance, whether for valuable consideration or by way of gift of land for any charitable use, the provisions of the recent Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), must be borne in mind. By this Act the former enactments relating to mortmain and charitable uses mentioned in the Schedule to the Act are repealed, and the whole law on the subject is consolidated and amended. The provisions of this Act so far as material for the present purpose will be found set out, with observations thereon, at the end of this Precedent.

In the preparation of conveyances upon charitable trusts the following conditions are now required by this Act:—

(i.) The assurance must be by deed, except in the case of copyholds.

(ii.) Such deed must be executed in the presence of at least two witnesses.

(iii.) The assurance, unless made for valuable consideration, must be made at least twelve months before the death of the assurer.

(iv.) The assurance must be enrolled in the Central Office of the Supreme Court of Judicature within six months after execution, unless the uses are declared by a separate instrument, in which case such instrument need alone be enrolled.

(v.) The assurance must be made to take effect in possession immediately from the making thereof.

(vi.) The assurance must be made without any power of revocation, reservation, condition, or provision for the benefit of the assurer, or any person claiming under him, except as provided in sect. 4, sub-sect. 4, of the Act: see *post*, p. 869.

(*r*) As to recital of the vendor's seisin see *Bolton* v. *London School Board*, 7 Ch. D. 766; and see *ante*, sub tit. "PURCHASE DEEDS," Vol. V., p. 142. This recital may be omitted if desired.

XX. Conveyance of Land for a Chapel.

tained unto the said [*trustees*] for the sum of £—— : NOW THIS INDENTURE] WITNESSETH that [in pursuance of the said agreement, and] in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*trustees*], (of which sum the said [*vendor*] hereby acknowledges the receipt), the the said [*vendor*], hereby as beneficial owner (*s*) conveys unto the said [*trustees*], and their heirs, ALL that piece or parcel of land, &c. [*describe parcels*], EXCEPTING out of this conveyance, and always reserving unto the said [*vendor*], his heirs and assigns, all mines and minerals whatsoever within or under the said piece or parcel of land hereby conveyed, with liberty for the said [*vendor*], his heirs and assigns, to dig for, work, get, carry away, and dispose of the same by underground workings only, without entering upon or breaking the surface of the piece or parcel of land hereby conveyed, and to do all things necessary or expedient for the purposes aforesaid or any of them, he and they leaving sufficient pillars to support the said surface and any buildings to be erected thereon, To HOLD all the premises hereby conveyed subject to the exceptions and reservations aforesaid, UNTO AND TO THE USE of the said [*trustees*], their heirs and assigns, UPON THE TRUSTS and with and subject to the powers and provisions hereinafter declared and contained concerning the same, that is to say, UPON TRUST that the said [*trustees*], or the survivors of them,

Testatum.

Exception of mines and minerals, &c. (*t*).

Habendum.

Declaration of trusts (*u*) :

(*s*) As to whether in an assurance by way of *gift* for religious, charitable, or other public purposes, the assurer should be required to enter into full covenants for title on his part, see *ante*, p. 221.

(*t*) By sect. 4, sub-sect. 4, of the Act of 1888, an assurance of land for charitable uses may contain a reservation of mines or minerals, or of any easement, or covenants or provisions as to the erection, repair, position, or description of buildings, &c.

If it is desired expressly to provide for compensation for disturbance of surface and buildings, add after the exception of mines, &c. :—

"BUT SUBJECT to the liability of the said [*vendor*], his heirs and assigns, to make compensation to the said [*trustees*], their heirs and assigns, &c. [*continue to end of clause as in Vol. V.*, p. 531, *mutatis mutandis*]."

For other forms of exceptions and reservations of mines and minerals and working powers, see *ante*, Vol. V., pp. 522, 532, and 533.

(*u*) The trusts and provisions given in this Precedent are

XX. Conveyance of Land for a Chapel.

or other the trustees for the time being of these presents (hereinafter called "the said trustees") shall build upon the said piece or parcel of land a chapel, with a school and class-rooms, [and a house of residence for a minister,] and such other buildings and accommodation as may be necessary, usual, or convenient for carrying on the work of the society of Protestant Dissenters, called, &c. [*give an accurate description of the Society* (*v*)], now meeting for divine worship at —— (hereinafter called "the said Society"); AND shall permit the said chapel or meeting-house, school and class-rooms respectively to be used as a place of public worship and instruction by the said Society, and also by such other persons as shall hereafter be united to the said Society, and for that purpose to permit to officiate in the said chapel or meeting-house, [and to reside in any house which may be erected upon the same premises for that purpose,] such person or persons of the denomination of Protestant Dissenters called, &c. [*describe them*], as the members of the said Society shall from time to time by special resolution elect as their minister or pastor during their will and pleasure only: AND UPON FURTHER TRUST that, in case a school or class-rooms shall be erected or provided upon the said premises, then the said trustees shall permit and suffer a Sunday or other school or schools to be held, conducted and carried on from time to time in the same school and class-rooms or any of them; or, if and so long as no school or class-rooms sufficient for such purposes shall be erected or provided upon the said premises, and if the members of the said Society shall by special resolution so determine,

to build chapel, school, &c.;

to permit use of premises for public worship and instruction;

to permit minister to occupy residence;

to permit Sunday schools, &c., to be held in school-buildings, or if none, in chapel;

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adapted by permission from two forms, one issued by the Baptist Building Fund, and the other in very frequent use in trust deeds of Non-Calvinistic Baptists, but they seem to be suitable for use, with such modifications as may be necessary to meet the particular circumstances, in the use of trust deeds of other religious societies. Wesleyan chapels, &c., are generally regulated by instruments following the form of their well-known "Model Trust Deed," which is easily accessible to those concerned, and too long for insertion among these Precedents.

(*v*) In describing the Society, it is usual, and perhaps convenient, to specify more or less particularly the tenets, adherence to which is requisite to membership.

XX. Conveyance of Land for a Chapel.

then the said trustees shall permit and suffer a Sunday or other school or schools to be conducted and carried on from time to time in the said chapel or meeting-house, either altogether, or so far as it may be deemed necessary or expedient by reason of the insufficiency of any school or class-rooms so for the time being erected or provided on the premises for the purposes aforesaid or any of them, but only at such hours and times as shall not interfere with public worship in the said chapel or meeting-house; and in all cases, whether in the said meeting-house or not, under such government, orders, and regulations, as shall be agreed upon by the members of the said Society: AND UPON FURTHER TRUST that the said trustees shall permit any part of the said trust premises to be used as a place for interment in such manner as the members of the said Society shall by special resolution direct: AND UPON FURTHER TRUST that the said trustees shall from time to time raise such sum or sums of money as the members of the said Society shall by special resolution direct by mortgage or mortgages of all or any part of the said trust estate, and make any conveyance, demise, or other assurance whatsoever for that purpose, including a power of sale, and all other usual covenants and powers; and shall lay out and apply all monies which shall from time to time be so raised as aforesaid, as and when the same shall be received by them the said trustees in or towards the building of the said chapel or meeting-house and other buildings hereinbefore mentioned, or any of them or any part thereof, or the rebuilding, enlarging, improving, repairing, or furnishing the same buidings or any of them or any part thereof respectively: AND UPON FURTHER TRUST that the said trustees shall, when thereunto required by a special resolution of the members of the said Society, absolutely sell the said hereditaments and premises, or exchange the said hereditaments and premises, or any part thereof, for any other lands or hereditaments, whether freehold, copyhold, customary, or leasehold, and make any conveyances or assurances whatsoever for the said purposes; PROVIDED ALWAYS that the said trustees shall stand seized or possessed of the hereditaments and premises which shall be so taken in exchange upon the same trusts as

to use land for burials (*x*).

to raise money on mortgage;

to apply mortgage monies in building, &c.;

to sell or exchange.

(*x*) See as to discontinuance of burials in populous places, stats. 15 & 16 Vict. c. 85, ss. 2—8; 16 & 17 Vict. c. 134, ss. 1—5; 18 & 19 Vict. c. 128, ss. 1, 2.

XX. Conveyance of Land for a Chapel.

are herein declared concerning the hereditaments hereby assured: And also shall stand possessed of the money which from time to time shall be received on any such sale, or exchange, upon trust to lay out and dispose of the same in the purchase of any such lands and hereditaments, as aforesaid, to be held upon the same or the like trusts as are herein declared concerning the hereditaments hereby assured, or for the improvement of the trust property, or the enlargement, repair, or rebuilding of the trust premises, or for such other purpose or purposes, for the benefit of the said Society, as the members of the said Society shall from time to time by special resolution direct; Provided always that upon any mortgage, sale, or exchange, purporting to be made in pursuance of any trust or power hereinbefore contained, no mortgagee, purchaser or other person dealing *bonâ fide* with the said trustees, shall be bound or concerned to inquire whether the occasion for executing or exercising such trust or power has arisen, or as to whether any such church meeting as aforesaid has been held, or as to the competency of or regularity of any such church meeting or of any requisition or resolution passed or purporting to have been passed thereat, or otherwise as to the propriety or regularity of any such mortgage, sale, or exchange, and notwithstanding any impropriety or irregularity in such mortgage, sale, or exchange, the same shall, as regards a purchaser, mortgagee, or such other person as aforesaid, be deemed to be within the aforesaid trusts or powers and be valid accordingly: But in case the said Society shall be totally dissolved or dispersed, or the regular public worship at the said chapel or meeting-house be discontinued by them for the space of twelve calendar months together, then upon further trust to let, convey, or otherwise dispose of the said chapel or meeting-house, hereditaments and premises, with the appurtenances, to such person or persons, for such term, in such manner, and for such purposes as the managers for the time being of a Society called, &c. [*describe this Society* (*y*)], or the major part of them, shall from time to time direct or appoint of or concerning the same: Provided also, and it is hereby agreed and declared, that when and so often, during the continuation of the trusts hereby created, as the number of the trustees shall by death,

Application of proceeds of sale or exchange.

Protection of mortgagees, purchasers, &c.

Trusts for sale, &c., on dissolution of the Society.

Power to appoint new trustees and vesting

(*y*) Any body of a permanent character belonging to the particular denomination may be named here, taking care to describe it accurately

resignation, removal from office or beyond the seas, or incapacity to act, be reduced to [five] or less, for the purposes aforesaid, or oftener, if the members of the said Society shall think it expedient, so many other persons shall be named and chosen to be trustees, as shall make up the whole number of trustees to [nine], such new trustees to be from time to time nominated, appointed, and chosen by a special resolution of the members of the said Society, and upon every such choice the continuing trustees for the time being shall by sufficient assurances in the law at the expense of the trust estate or of the funds of the said Society, assure the said chapel or meeting-house, hereditaments, and premises, with the appurtenances, in such manner that the same may become legally and effectually vested in such new trustees or trustee jointly, with any continuing trustees, or in such new trustees only as the case may require, upon such or the like trusts and for such or the like intents and purposes as are hereinbefore declared and expressed of and concerning the same premises: PROVIDED ALWAYS that the term "special resolution" in these presents shall mean a resolution passed at a meeting of the members of the said Society duly convened by a majority of not less than two-thirds of the members then present; and also that any question, matter, or thing relating to the government, regulation or administration of the said Society or its affairs, or the premises not hereinbefore directed to be determined by special resolution, may be determined by a simple majority of the members present at any meeting of the members of the said Society duly convened: PROVIDED LASTLY, that every meeting of the members of the said Society shall be convened by notice given in the said chapel or meeting-house during divine service on the two Sundays immediately preceding such meeting; and that similar notice shall be given of any special resolution intended to be submitted to any such meeting.

in them of property (*z*).

Proviso as to special and ordinary resolutions.

Proviso as to notices of meetings.

IN WITNESS, &c.

(*z*) As to the appointment of new trustees of religious societies, and the vesting of trust property in them jointly with the continuing trustees or trustee, see Sir Morton Peto's Act (13 & 14 Vict. c. 28), set out and considered *ante*, Vol. II., pp. 60 *et seq.*, notes.

NOTE.—The Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42, which passed into law on the 13th of August, 1888), is mainly a consolidating statute, whereby the former law on

Mortmain and Charitable Uses Act, 1888.

Mortmain and Charitable Uses (which had hitherto to be gathered from a long series of enactments) is restated in a brief and simple form. Such alterations as have been introduced by this Act will be shortly noticed in the following remarks; but for the most part the observations contained in the dissertation on "MORTMAIN" (*ante*, Vol. IV., pp. 1 to 66), are still applicable under the recent Act. See the observations of *North*, J., in *Re David, Buckley* v. *Royal National Life-boat Institution*, 41 Ch. D. at p. 175.

Part I., Mortmain.

Forfeiture.

Part I. of this Act prohibits the assurance to, or acquisition by or on behalf of any corporation in mortmain of land except by licence of the sovereign or under any statute for the time being in force, and provides that any land unlawfully assured or acquired shall be forfeited to the sovereign or the mesne lord as the case may be. This provision is in the main a re-enactment of the old statutes on the subject, but there are one or two important points to be noticed. This Act for the first time provides that land assured to a corporation without licence shall be *absolutely* forfeited from the date of the assurance: formerly, the land was only *liable* to forfeiture on entry by the crown (see *Doe* d. *Hayne* v. *Redfern*, 12 East, 96), and only as from the date of such entry. An apparent contradiction is also to be noticed between the enactment in this section that the effect of an unlawful assurance (whether by deed or will, see sect. 10 (1)) is forfeiture of the land to the crown or the mesne lord, and the enactment in sect. 4 (1) that every such assurance, unless made in accordance with the requirements of this Act is to be void, the effect of which would, in the case of a devise, cause the heir-at-law or residuary devisee or legatee to take. The only way out of the difficulty would seem to be to hold that the word "assurance" in sect. 1 is only intended to apply to an assurance *inter vivos*. It is presumed that the term "corporation" in that section is to be deemed to be restricted so as to mean "charitable corporations." As to the power of companies registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), to hold land under sect. 18 of that Act, see *ante*, Vol. IV., p. 22. In any case no doubt the exemption from the operation of this Act given by sect. 8 thereof (*infra*) would apply to such companies.

Power to grant licences in mortmain.

By sect. 2 it is enacted that:—"It shall be lawful for Her Majesty the Queen, if and when and in such form as she thinks fit, to grant to any person or corporation a licence to assure in mortmain land in perpetuity or otherwise, and to grant to any corporation a licence to acquire land in mortmain and to hold the land in perpetuity or otherwise." See as to licences in mortmain, *ante*, Vol. IV., pp. 15, 16. Sect. 3 contains a saving of rents and services due to the sovereign or the lord.

Part II., Charitable Uses.

Part II. of the Act deals with charitable uses, and enacts as follows:—

Conditions under which assurances may be made to charitable uses.

Sect. 4.—"(1.) Subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void.

Mortmain and Charitable Uses Act, 1888.

"(2.) The assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof.

"(3.) The assurance must, except as provided by this section, be without any power of revocation, reservation, condition, or provision for the benefit of the assuror or of any person claiming under him.

"(4.) Provided that the assurance, or any instrument forming part of the same transaction, may contain all or any of the following provisions, so, however, that they reserve the same benefits to persons claiming under the assuror as to the assuror himself; namely,

"(i.) The grant or reservation of a peppercorn or other nominal rent;

"(ii.) The grant or reservation of mines or minerals;

"(iii.) The grant or reservation of any easement;

"(iv.) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance as of any other adjacent or neighbouring land;

"(v.) A right of entry on non-payment of any such rent or on breach of any such covenant or provision;

"(vi.) Any stipulations of the like nature for the benefit of the assuror or of any person claiming under him.

"(5.) If the assurance is made in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rentcharge, or other annual payment reserved or made payable to the vendor, or any other person, with or without a right of re-entry for nonpayment thereof.

"(6.) If the assurance is of land, not being land of copyhold or customary tenure, or is of personal estate, not being stock in the public funds, it must be made by deed executed in the presence of at least two witnesses.

"(7.) If the assurance is of land, or of personal estate, not being stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made at least twelve months before the death of the assuror, including in those twelve months the days of the making of the assurance and of the death.

"(8.) If the assurance is of stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made by transfer thereof in the public books kept for the transfer of stock at least six months before the death of the assuror, including in those six months the days of the transfer and of the death.

"(9.) If the assurance is of land, or of personal estate other than stock in the public funds, it must, within six months after the execution thereof, be enrolled in the Central Office of the Supreme Court of Judicature, unless in the case of an assurance of land to or for the benefit of charitable uses those uses are declared by a separate instrument, in which case that separate instrument must be so enrolled within six months after the making of the assurance of the land."

Mortmain and Charitable Uses Act, 1888.

This section in effect re-enacts the provisions of the stat. 9 Geo. 2, c. 36, set out, *ante*, Vol. IV., pp. 2 *et seq.*, as modified by the stats. 24 Vict. c. 9, and 27 Vict. c. 13 (*ante*, Vol. IV., pp. 5 *et seq.*). The omission is, however, to be observed from this section of the words in the stat. 9 Geo. 2, c. 36, on which is founded the doctrine prohibiting the gift of impure personalty to charitable purposes except in compliance with the Act. It, nevertheless, seems clear that the doctrine still continues in force, as by the interpretation clause in sect. 10 (iii), "land" is to include any *interest* in land. See, as to what property may be given to Charity, *ante*, Vol. IV., pp. 23 *et seq.*

Omission to enrol.

Sect. 5 provides for the case of omission within the requisite time owing to ignorance or inadvertence or through the destruction or loss of the instrument by time or accident, and for the remedy of such omission. Compare the repealed provisions as to such omission of the repealed stat. 29 & 30 Vict. c. 59, set out *ante*, Vol. IV., p. 7.

Part III. provides for cases exempted from the operation of the Act.

Assurances for a public park, elementary school, or public museum.

Sect. 6.—"(1.) Parts One and Two of this Act shall not apply to an assurance by deed of land of any quantity or to an assurance by will of land of the quantity herein-after mentioned for the purposes only of a public park, a schoolhouse for an elementary school, a public museum, or an assurance by will of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only :

"(2.) Provided that a will containing such an assurance, and a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration, must be executed not less than twelve months before the death of the assuror, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assurer, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed the execution of the deed.

"(3.) The quantity of land which may be assured by will under this section shall be any quantity not exceeding twenty acres for any one public park, and not exceeding two acres for any one public museum, and not exceeding one acre for any one school-house.

"(4.) In this section :—

"(i.) 'public park' includes any park, garden, or other land dedicated or to be dedicated to the recreation of the public ;

"(ii.) 'elementary school' means a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed ninepence a week ;

"(iii.) 'school-house' includes the teacher's dwelling-house, the playground (if any), and the offices and premises belonging to or required for a school ;

"(iv.) 'public museum' includes buildings used or to be used

Mortmain and Charitable Uses Act, 1888.

for the preservation of a collection of paintings or other works of art, or of objects of natural history, or of mechanical or philosophical inventions, instruments, models, or designs, and dedicated or to be dedicated to the recreation of the public, together with any libraries, reading-rooms, laboratories, and other offices and premises used or to be used in connection therewith."

Effect of sect. 6.

This section is virtually a re-enactment of the provisions of the repealed stat. 34 & 35 Vict. c. 13 (*ante*, Vol. IV., pp. 17, 18), with the modification introduced in sub-sect. (2), *supra*, rendering valid an assurance by will or deed which is a reproduction in substance of a devise made by a previous will in force at the time of such reproduction, and executed not less than twelve months before the assuror's death.

Assurances for certain universities, colleges, and societies.

Sect. 7. "Part Two of this Act shall not apply to the following assurances:—

"(i.) An assurance of land, or personal estate to be laid out in the purchase of land, to or in trust for any of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the colleges or houses of learning within any of those Universities, or to or in trust for any of the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations of those last-mentioned colleges, or to or in trust for the warden, council, and scholars of Keble College;

"(ii.) An assurance, otherwise than by will, to trustees on behalf of any society or body of persons associated together for religious purposes or for the promotion of education, art, literature, science, or other like purposes of land not exceeding two acres for the erection thereon of a building for such purposes, or any of them, or whereon a building used or intended to be used for such purposes, or any of them, has been erected, so that the assurance be made in good faith for full and valuable consideration;

"Provided that the trustees of the instrument containing any assurance to which this section applies or declaring the trusts thereof, may, if they think fit, at any time cause the instrument to be enrolled in the Central office of the Supreme Court of Judicature."

The first sub-section of this section is, in simpler language, a re-enactment of the provisions of sect. 4 of the 9 Geo. 2, c. 36 (*ante*, Vol. IV., p. 3), with the extension of the exception to the Universities of London and Durham, the Victoria University, and Keble College. The second sub-section is virtually identical with the provisions of the 31 & 32 Vict. c. 44 (*ante*, Vol. IV., p. 17).

Substitution of provisions of Act for corresponding repealed enactments.

Sect. 8. "Where by any statute now in force any provision of the enactments hereby repealed is excluded either wholly or partially from application, or is applied with modification, in every such case the corresponding provision of this Act shall be excluded or applied in like extent and manner."

The exemptions, under or by virtue of any statute not repealed

Mortmain and Charitable Uses Act, 1888.

in the schedule, from the general law with regard to gifts for charitable purposes under the repealed Acts, are thus expressly continued and rendered applicable to the provision of the Act. A full discussion of these exemptions will be found *ante*, Vol. V., pp. 13 to 22. See also the saving proviso in sect. 13, *infra*.

Adaptation of law to system of land registration.

38 & 39 Vict. c. 87.

Sect. 9. "Any assurance of land which is by this Act required to be made by deed may be made by a registered disposition under the provisions of the Land Transfer Act, 1875, or of any Act amending the same, and any assurance so made shall be exempt from the provisions of this Act as to execution in the presence of witnesses, and as to enrolment in the Central Office of the Supreme Court."

Definitions.

Sect. 10. "In this Act, unless the context otherwise requires,—

"(i.) 'Assurance' includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument; and 'assure' and 'assuror' have meanings corresponding with assurance.

"(ii.) 'Will' includes codicil.

"(iii.) 'Land' includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land.

"(iv.) 'Full and valuable consideration' includes such a consideration either actually paid upon or before the making of the assurance, or reserved or made payable to the vendor or any other person by way of rent, rentcharge, or other annual payment in perpetuity, or for any term of years or other period, with or without a right of re-entry for nonpayment thereof, or partly paid and partly reserved as aforesaid."

Sect. 11. "This Act shall not extend to Scotland or Ireland."

Gifts of realty in Ireland for charitable purposes are governed by the stat. 7 & 8 Vict. c. 97, s. 16, set out *ante*, Vol. IV., p. 11.

Sect. 12. "Nothing in this Act shall affect the operation or validity of any charter, licence, or custom in force at the passing of this Act enabling land to be assured or held in mortmain."

Sect. 13.—"(1.) The Acts specified in the Schedule to this Act are hereby repealed, from and after the passing of this Act, to the extent specified in the third column of that schedule:

"Provided that this repeal shall not affect—

"(*a*) Any enactment not hereby repealed referring to any enactment hereby repealed, except that in lieu of that reference the unrepealed enactment shall be construed as if it referred to the corresponding provisions of this Act; or

"(*b*) The past operation of any enactment hereby repealed, or any instrument or thing executed, done, or suffered before the passing of this Act; or

"(*c*) Any right, obligation, or liability acquired, accrued or incurred under any enactment hereby repealed; or

"(*d*) Any action, proceeding, or thing pending or uncompleted at the time of the passing of this Act."

Mortmain and Charitable Uses Act, 1888.

By sub-sect. 2 of this section the preamble to the stat. 43 Eliz. c. 4 (being one of the enactments repeated in the schedule) is recited, and it is enacted that references to the charities mentioned in the preamble shall be construed as references to charities within the meaning, purview, and interpretation of the said preamble. This preamble has long been regarded as giving the standard definition of legitimate objects of charity. The effect of this sub-section is to continue in force the general law on this subject as laid down in the preamble and the numerous decisions whereby it has been interpreted, and its extent and application sought to be defined. A full discussion of this question will be found *ante*, Vol. IV., pp. 39 *et seq.*, where the preamble is set out fully.

Since that volume was published, the following objects have been decided to be charitable:—Aged persons attending a specified chapel, *Re Wall*, W. N. 1889, p. 157; Friendly Society, *Pease* v. *Pattinson*, 32 Ch. D. 154; repair of churchyard, but not of testator's tomb, *Re Vaughan*, 33 Ch. D. 187; repair of sea-dykes, *Wilson* v. *Barnes*, 38 Ch. D. 507; society for the benefit of animals generally, *Re Douglas*, 35 Ch. D. 507; but not the support of particular animals, *e.g.* the testator's horses and hounds, *Re Dean*, 41 Ch. D. 552.

The Schedule to the Act is as follows:—

Acts Repealed.

Note.—This Schedule is to be read as referring to the Revised Edition of the Statutes prepared under the direction of the Statute Law Committee, in all cases of statutes included in that edition as already published.

The chapters of the statutes (before the division into separate Acts) are described by the marginal abstracts given in that edition.

Session and Chapter.	Title.	Extent of Repeal.
7 Edw. 1.	*Statut' de Viris Religiosis*	The whole Act.
13 Edw. 1, c. 32.	Remedy in case of mortmain under judgments by collusion.	The whole chapter.
18 Ed. 3, st. 3, c. 3.	Prosecutions against religious persons for purchasing lands in mortmain.	The whole chapter.
15 Rich. 2, c. 5.	St. 7 Edw. 1, de Religiosis. Converting land to a churchyard declared to be within that statute. Mortmain where any is seised of lands to the use of spiritual persons. Mortmain to purchase lands in guilds, fraternities, offices, commonalties, or to their use.	The whole chapter.

SCHEDULE—*continued.*

Session and Chapter.	Title.	Extent of Repeal
23 Hen. 8, c. 10.	An Acte for feoffments and assurance of landes and tenements made to the use of any parisshe Churche, Chapell, or suche like.	The whole Act.
43 Eliz. c. 4.	An Acte to redresse the misemployment of landes, goodes, and stockes of money heretofore given to charitable uses.	The whole Act.
7 & 8 Will. 3, c. 37.	An Acte for the encouragement of charitable gifts and dispositions.	The whole Act.
9 Geo. 2, c. 36.	An Act to restrain the disposition of lands whereby the same become inalienable.	The whole Act, except so much of section five as is unrepealed.
9 Geo. 4, c. 85.	An Act for remedying a defect in the titles of lands purchased for charitable purposes.	The whole Act.
24 & 25 Vict. c. 9.	An Act to amend the law relating to the conveyance of land for charitable uses.	The whole Act.
25 & 26 Vict. c. 17.	An Act to extend the time for making enrolments under the Act passed in the last session of Parliament, intituled, "An "Act to amend the law rela- "ting to the conveyance of "land for charitable uses, and "to explain and amend the "said Act."	The whole Act.
27 & 28 Vict. c. 13.	An Act to further extend the time for making enrolments under the Act passed in the twenty-fourth year of the reign of Her present Majesty, intituled "An "Act to amend the law rela- "ting to the conveyance of "lands for charitable uses, and "otherwise to amend the said "law."	The whole Act
29 & 30 Vict. c. 57.	An Act to make further provision for the enrolment of certain deeds, assurances, and other instruments relating to charitable trusts.	The whole Act.
31 & 32 Vict. c. 44.	An Act for facilitating the acquisition and enjoyment of sites for buildings for religious, educational, literary, scientific, and other charitable purposes.	Sections one and two.

SCHEDULE—*continued.*

Session and Chapter.	Title.	Extent of Repeal.
34 & 35 Vict. c. 13.	An Act to facilitate gifts of land for public parks, schools, and museums.	The whole Act.
35 & 36 Vict. c. 24.	An Act to facilitate the incorporation of trustees of charities for religious, educational, literary, scientific, and public charitable purposes, and the enrolment of certain charitable trust deeds.	Section thirteen.

INDEX

TO THE

DISSERTATIONS AND NOTES.

ACCRUER OF TITLE,
meaning of, in M. W. P. Act, 1882...136, n.

ACCUMULATION,
trust for, absolute, maintenance ordered notwithstanding, 310
during life of settlor is valid, 561, n.
during minority, statutory, 304, 306
out of income of land, 309

ACKNOWLEDGMENT,
of confirmation deed, 150
disentailing assurance, 522
release, when necessary, 65, n., 739, n.
settlement of land, &c., 132, 144
under Malins' Act, 132, 296

ACQUIESCENCE,
whether part performance of parol agreement for settlement, 213

ACTION,
stay of proceedings in, 106, n.

ADDITIONAL POWERS,
may be given by settlement, 491

ADEMPTION,
applies only to children, 425
debt from father to child, whether adeemed by portion, 428
different gifts by same will, 425
donor parent or in *in loco parentis*, 429
stranger to donee, 431
ejusdem generis, gifts must be, 426
election does not arise as to, 428
gift of residue, 424
legacy, codicil will not restore adeemed, 427

ADEMPTION—*continued.*
legitimate and illegitimate children, distinction between, 430
meaning and nature of, 418
presumption as to intention, 418 *et seq.*
pro tanto, 424
satisfaction less easily presumed than, 419

ADMINISTRATOR,
assent by, on behalf of infant, 810, n.
statutory power to compound does not extend to, 357

ADULTERY,
dower forfeited by, 359
separation deed avoided by, 99, 101

ADVANCEMENT,
acceleration of title by, under Succession Duty Act, 314
by parent in satisfaction of portion, 415
"by portion" within Statute of Distributions, 313
consent to, power of, whether extinguished by bankruptcy, 315
express clause for, insertion of, 311
hotchpot clause, 314
meaning of, 311 *et seq.*
payment to trustees of daughter's settlement, 312
power of, in settlements, 311
insertion in powers of appointment, 302
succession duty on, 314
"usual clause" for insertion in settlement, 205

ADVICE,
of Court as to investments of trust funds, 281
under S. L. Acts, 489

ADVOWSON,
settlement of, 754, n.

AFTER-ACQUIRED PROPERTY, COVENANT TO SETTLE,
of husband, 320, 321
of wife, 321 *et seq.*
advisability of inserting, 321
bankruptcy of wife does not affect, 330
covenant by husband alone, effect of, 323, 325
duties of trustees as to, 549, n.
"from one source," 328
"it is hereby agreed," &c., implies covenant by all parties, 324
jewellery, &c., exception of, 333
judicial separation, effect of, 330
lapse, property preserved from, not within, 332
life assurance, policy of, subsequent to marriage, 330
limit of value usually fixed, 332

AFTER-ACQUIRED PROPERTY, COVENANT TO SETTLE—*continued.*
of wife, property existing at marriage not included, 327, 328
settled to separate use, exception of, 333
reversionary interest falling in after wife's death, 329
words excluding, 331
trustee's duties as to, 549, n.
volunteer cannot enforce, 327

AGENT,
employment of, by trustee, 271

AGREEMENT,
for purchase of furniture on hire system, 803, n.
on marriage is within Statute of Frauds, 201
And see "*Marriage Articles.*"

ALIEN,
settlement by, 161

ALIENATION,
defeazance of curtesy by, 369
dower by, 360
forfeiture on, bankruptcy does not operate on, 289
charging order causes, 288
defeazance of gift over does not avoid, 288
marriage of woman does not now cause, 290
life interest of husband determinable on, 284 *et seq.*
as to his own property, 284, 285
as to wife's property, 286
of wife, 290
And see "*Anticipation, Restraint on.*"
what constitutes attempted, 288 *et seq.*

ANNUITY,
apportionment of, 115, n.
charged on land, release of, 39, 60, n., 403
remedies for recovery of, 386, 694, n.

ANTICIPATION, RESTRAINT ON,
absolute interest subject to, 294
admissibility of, 295, 296
breach of trust at instance of married woman under, 346
confined to intended coverture, or general, 294
corpus may be subjected to, 294, 295
costs of proceedings improperly instituted by wife, 293
covenants to settle after-acquired property, 322
estate tail barrable notwithstanding, 295
fraud of wife, 292
income subject to, whether trustees may impound for costs, &c., 292

ANTICIPATION, RESTRAINT ON—*continued.*
M. W. P. Act does not affect, 142, 293
origin of, 291
power of Court to remove, 297, 298
release by married woman under, 48
ettlement for the purpose of imposing, on life interest under former settlement, 526, n.
statutory powers exercisable notwithstanding, 295, 495
suggested extension of, since M. W. P. Act, 1882...295
trustee's duties as to payment to wife under, 296
usual" in settlements, whether, 206

APPOINTMENT OF REGISTRARS,
n Middlesex, 3
Yorkshire, 9

APPOINTMENT, POWER OF,
of new trustees of religious societies, 867, n.
separation deed, 112
settlement, 339 *et seq.*
under S. L. Acts, 518
protector of settlement, 528, 529
trust funds among children, &c., 299 *et seq.*
distinction between general and special, 546, n.
exclusive, 299
exercise of, after bankruptcy, 160, 576, n.
by survivor, 302
extension of, to remoter issue, 299
form of, 301
hotchpot clause, 303, 304
illusory, 300
lapse, 299
maintenance, education, and advancement, 301, 302
perpetuities, rule against, 546, n.
revocation, reservation of power of, 302
release of, 58, n.
trust for children in default of exercise of, 303
ultimate trusts giving to wife a, 315 *et seq.*

APPORTIONMENT,
of annuity under separation deed, 115, n.
blended trust funds, 357
jointure rentcharge, 402
rent, on building lease under S. L. Acts, 450, *see* Vol. III., p. 33
surrender of part of lease under S. L. Acts, 454
on change of investment, tenant for life has no right to, 281
where interest is in arrear, 282
where sale of reversion is postponed, 282

ARRANGEMENT. See "*Family Arrangement.*"

ARREARS,
of income payable to wife, 296
pin money, how far recoverable, 385

ARTICLES FOR SETTLEMENT,
See "*Marriage Articles.*"

ASSENT OF EXECUTOR,
by administrators, *durante minore ætate*, 810, n.
married woman, 810, n.
one of several executors, 810, n.
completion of legatees' title by, 808, n.
real estate, devisee of, may enter without, 810, n.
relation back of, 809, n.
release of debts by testator's will, 808, n.
revocable and conditional, 811, n.
to one having a partial interest, 809, n.
what constitutes, 812, n.
when may be given, 811, n.

ASSIGNEE FOR VALUE,
of tenant for life not affected by powers under S. L. Acts, 486

ASSIGNMENT,
of chose in action, 78, n., 242
lease, by way of mortgage, to be registered, 7, n.
where lease is unregistered, 15

ATTESTATION,
of memorial in registry of Middlesex, 3, n.

ATTORNEY, POWER OF,
assignment of chose in action does not require, 76, n., 242, 565, n.
life policy does not require, 246, 247

AUTRE VIE, ESTATE *PUR*,
husband's interest in wife's, 370
quasi entails of, 537
widow's interest in husband's, 361

BANK STOCK,
investment of trust funds in, 256

BANKRUPTCY,
adjudication of, vests debtor's property in trustee, 159
advancement, power of consent to, whether extinguished by, 315
avoidance of voluntary settlement by, 181
consent to advancement after, 314, 315
covenant in marriage settlement to pay sum of money, 183
to settle after-acquired property, 184, 321

BANKRUPTCY—*continued.*
debts, capacity to pay, how tested, 183
discharge, refusal of, where marriage settlement is in hands of creditors, 185
whether releases from covenant to settle, 183, n.
disentailing assurance by trustee in, 536
forfeiture on alienation, whether extends to, 289
fraudulent settlements, 185
life interest determinable on, 284 *et seq.*
absolute discretion of trustees over husband's income, 286
annulment or discharge before first payment, 287
composition by firm in which tenant for life is partner, 288
existing bankruptcy at date of settlement, 287
filing of petition not followed by adjudication, 289
gift over not necessary, 286
maintenance of wife, &c., after husband's, provisions for, 618, n.
married woman trading may be made bankrupt, 135, 184
order and disposition of debtor, 803, n.
post-nuptial settlements, what consideration will support, 184
powers, exercise of, notwithstanding, 160, 576, n.
"settlement," meaning of, 182
settlements for valuable consideration protected, 160
tenant in tail, 536
trustee, title of, relation back of, 160
vesting of property in, 160, 242, 243, 249
voluntary settlement, void in, 127, n., 181, 183, 321

BARE TRUSTEE,
conveyance by married woman, 141, n.
protection of settlement, 526, 528

BARGAIN AND SELL,
effect of words, to vest term without entry, 763, n.

BASE FEE,
definition of, 492, n.
enlargement of, 531
quasi, 539
statutory powers under S. L. Act, owner of, has, 492

BEDFORD LEVEL ACT,
registration of conveyances and charges under, 2, n.

BENEFICE,
presentation to, 848, n.

BENEFICIAL OWNER,
objections to making settlor convey as, 219

BILL OF EXCHANGE,
settlement of debt secured by, 243
to secure instalments of purchase-money, 805, n.

BILLS OF SALE ACTS,
exemption of marriage settlements of chattels from, 185, 241
And see "*Chattels.*"

BOND,
release by obligee of, 31
settlement of, 242

BONUS,
assignment of life policy includes, 245

BOROUGH ENGLISH,
widow's interests in husband's lands in, 359

BREACH OF TRUST,
at instance of *cestui que trust*, 345, 346
delegation of powers to co-trustee, 344
indemnity for, 343 *et seq.*
married woman liable for, 140
release of, to one trustee releases others, 35

BRICKFIELD,
investment of trust funds on mortgage of, 266, 267

BUILDING LEASE,
under Ecclesiastical Leasing Acts, 854, n.
under S. L. Acts, appropriation for streets, &c., 456
definition of, 446
power to grant, 450
variation of, 451

BURIALS,
in populous places, restrictions on, 865, n.

BUSINESS,
advancement of daughter by establishing husband in, 312
settlement of, 240

CANALS,
construction of, under S. L. Acts, 469, 473, n.

CAPITAL MONEY, UNDER S. L. ACTS,
arising from lease or reversion, 478
consideration for surrender, 454
conversion of, 729, n.

CAPITAL MONEY, UNDER S. L. ACTS—*continued.*
devolution of, 464
fines on grants of leases, 444
income of, 464
investment and application of, 463
in land in England, 465
money in Court, applicable as, 476
in hands of trustees, applicable as, 477
payment of, to trustees or into Court, 463
to not less than two trustees, 518
payment of costs out of, 463
under settlement or trust for sale, 330

CAVEAT,
under Yorkshire Registry Act, 11

CERTIFICATE,
as to improvements under S. L. Acts, 471
discharge of mortgages, registration of, 7
memorials of judgments, &c., 9

CHANCERY DIVISION,
jurisdiction of, as to applications, &c., under S. L. Acts, 485
portions, 411
rectification of settlements, 207 *et seq.*
exclusive of, under Fines and Recoveries Act, 533
over wards of Court, 144, 156 *et seq.*

CHAPEL,
conveyance of land for, 862 *et seq.*, nn.

CHARGE,
for improvement of land, not an incumbrance, 267, n.
repairs by tenant for life, not, on inheritance, 397
under S. L. Acts for enfranchisement, &c., 456
notice of intention to make, 481
transfer of, 450

CHARGING ORDER,
forfeiture on alienation caused by, 288

CHARITY,
gifts of realty in Ireland to, 872, n.
Mortmain and Charitable Uses Act, 1888...868 *et seq.*, nn.
proceeds of sale of lands of, in Court, 476, n.

CHATTELS,
delivery of, to wife on separation, 115, n.
settled, possession of, is in trustees, 241
registration under Bills of Sale Acts, of, 185, 241
settlement of, how effected, 240. 241
with realty as heirlooms, 511 *et seq.*

CHILDREN,
ademption applies only to, 425
appointment of trust funds among, power of, 299 *et seq.*
trusts in default of appointment, 303
custody of, on separation, 109 *et seq.*
default of, ultimate trusts in, 315 *et seq.*
grandchildren are not objects of power to appoint to, 299
lapse of appointed shares, 299
marriage consideration, whether includes settlor's, by former marriage, 173
by future marriage, 172
illegitimate, 172
younger, provisions of portions for, 403 *et seq.*
And see "*Portions.*"

CHOSE IN ACTION,
assignment of, power of attorney unnecessary on, 76, n., 242
settlement of, 242

CHURCH,
grant by married woman for building, 133

CITY OF LONDON,
not within Middlesex Registry Act, 7, n.

CODICIL,
adeemed legacy not restored by, 427

COLLATERALS,
consideration for settlement, how far extends to, 171

COLONIAL STOCKS,
investment of trust funds in, 259

COMMITTEE. See "*Lunatic.*"

COMMONS,
regulation of, 841, n.

COMPANY,
debentures and debenture stock, distinction between, 262, n.
life assurance, are not trustees of policy monies, 247
power of, to hold land, 868, n.
shares in, settlement of, 242

COMPOSITION,
powers for trustees to make, 356

CONDITIONS,
depreciatory, on sale by trustees, 227, 662, n.
of residence in settlements, 503 *et seq.*

CONDONATION,
proviso as to, in separation deeds, 106

CONFIRMATION OF ESTATE,
nature and effect of, 812 *et seq.*, nn.
tail, voidable, 532

CONFIRMATION OF LEASE,
by limited owners generally, 813, n.
under S. L. Acts, 454

CONFIRMATION OF SETTLEMENT,
acknowledgment of deed of, when necessary, 150
by husband, 149
widow, 150
wife, 149
costs of further assurances for, 223
effect of, 149
election, doctrine of, 147
on behalf of lunatic, 150
infant's settlement voidable, not void, 148
married woman's property in Court, 150
Married Women's Property Act, effect of, 151
mode of framing, 616, n.
writing necessary to, 151

CONFLICTING POWERS,
statutory and express, 489

CONSENT,
of bankrupt tenant for life to advancement, 314, 315
parents, guardians, &c., to marriage, 303
protector of settlement to barring entail, 527, 531
to enlargement of base fee, 531
tenant for life to exercise of powers by trustees, 231, 489
investment of capital monies, 463

CONSIDERATION,
for resettlement of family estate, eldest son should have 382
separation deed, 92 *et seq.*
settlement, 164 *et seq.*
adequacy of, 165
bargains between husband and wife, 175
collaterals, whether within, 171
consent of parties to marriage, 167
covenants may be part of, 166

CONSIDERATION—*continued.*
for settlement—*continued.*
express or implied, 164
good and valuable, distinguished, 164
immoral and illegal, 165
limits of, 170
marriage, 166, 167
mutual contract, 172
quantum of, 170
release of dower, 175
voluntary settlements void against creditors, 176 *et seq.*
void against purchasers, 167 *et seq.*
And see "*Voluntary Settlements.*"

CONSOLIDATION OF MORTGAGE,
against settled property, none, 169
second mortgages now relieved from risk of, 268

CONTEMPLATION OF MARRIAGE,
"upon or in," meaning of, in Infants' Settlement Act, 152

CONTINGENT INTEREST,
maintenance, statutory power of, does not extend to, 305, 306

CONTINGENT REMAINDERS,
limitations to trustees to preserve, 398 *et seq.*

CONTRACT,
by married woman, 134, 135
tenant for life under S. L. Acts, 475
"English," meaning of, 162

CONTRIBUTORY MORTGAGE,
trustees should not lend on, 268, 279

CONVERSION,
capital moneys under S. L. Acts, 729, n.
curtesy in money to be laid out in land, 368

CONVEYANCE,
by married woman, bare trustee, 141, n.
settlor, what covenants for title should be given on, 219
tenant for life, completion of sales, &c., by, 457
operation of, 457, 458

COPYHOLDS,
conveyance of, under S. L. Acts, 458
curtesy in, 368
disentailer of, 524, 790, n.
enfranchisement, charges for, 267, 456, n.

COPYHOLDS—*continued.*
freebench, in, 361
improvement charges on, not incumbrances, 267, n.
license to lease under S. L. Acts, 455
Middlesex Registry Act excludes, 7
settlement of, covenant to surrender for purpose of, 234, 235
in trust for sale, 236
upon trusts corresponding to uses in strict settlement, 235
surrenders of, by whom prepared, 686, n.
trust and mortgage estates in, devolution of, 657, n.
voluntary settlement of, void under 27 Eliz. c. 4, 169

CORPORATION,
lease by, memorial of, 3, n.

COSTS,
of further assurances for confirming settlements, 223
release, by whom borne, 49
settlement, by whom paid, 635, n.
trustees in execution of trusts, &c., 350 *et seq.*
payment of, out of capital monies under S. L. Acts, 463
under Agricultural Holdings Act, 470

CO-TRUSTEE,
trust funds should not be lent to, 279

COUNTY COURT,
jurisdiction of, under S. L. Acts, 485

COURT,
control of, cash under, 259
over its wards, 144, 153 *et seq.*
jurisdiction of, see "*Chancery Division.*"
leave of, to cutting timber on settled lands, 478
sale, &c., by committee of lunatic, 484
of settled heirlooms, 479
mansion house, &c., 455
money in, disentailer of, 536
procedure, &c. of, under S. L. Acts, 485
restraint or anticipation removable by, 297, 298
variation of leases by, under S. L. Acts, 451

COVENANTS,
breach of wife's, avoids separation deed, whether, 100
for title in settlements, 217 *et seq.*
"beneficial owner," whether settlor should convey as, 217
costs of further assurances, 223
married women, 223
mortgaged property, 220
"settlor," extent of covenant implied by conveyance as, 222

COVENANTS—*continued.*
statutory implied, 221
voluntary settlements, 220
not to sue, whether amounts to release, 27, 35
to bequeath equal share to child on marriage, 596, n.
execute disentailing assurance, 534
settle after-acquired property of husband, 180, 320, 321
wife, 321 *et seq.*

CREDIT,
authority of wife to pledge husband's, 102

CREDITORS,
judgment, not purchasers within 27 Eliz. c. 4, 169
separation, voluntary, does not bind, 93
settlement, fraudulent, is void as against, 176 *et seq.*
And see "*Fraudulent Settlement.*"

CROWN RENT,
redemption of, out of capital money, 459

CROWN REVERSION,
base fee with, 492
estates tail, with, 491, 492, 522, n.

CURTESY,
actual seisin generally necessary to, 363
birth of heritable issue necessary to, 363
copyholds, 368
defeazance of, by alienation, &c., 369
by settlement, 369, 370
distinctions between dower and, 362 *et seq.*
excluded by limitation to separate use, whether, 364
by Married Women's Property Act, whether, 365
expired estates tail, 370, 371
freeholds *pur autre vie*, 370
money to be laid out in purchase of land, 368
protectorship of settlement by estate of, 525
separation affects right to, whether, 101
separation deed supported by consideration of release of, 94
statutory powers of tenant by, 370

DEBENTURES AND DEBENTURE STOCK,
investment of trust funds in, 262
settlement of, 242

DEBTS,
ademption of, by portion, 428
assent to legacy before payment of testator's, 811, n.
release of, by will, 808, n.

DEBTS—*continued.*
indebtedness of settlor avoids settlement, when, 178
release of, by will, 868, n.
settlement of, effected by assignment, 242 *et seq.*

DEBTOR,
release to one, discharges co-debtors, 34

DEDICATION
of streets, &c., to public by limited owners, 456

DEDUCTION
payment of rentcharge without, 402

DEED,
cancellation of, when amounts to release, 28
of separation and executory agreement distinguished, 92
release must be by, 27

DELEGATION,
of execution of trust, 272, 344

DELIVERY,
chattels pass by, 115, 240
of life policy to trustees of settlement, 249

DEMESNE LANDS,
restrictions on sale on lease of, under S. L. Acts, 455

DESCENT,
statutory declarations as to matters of, 824, n.

DEVOLUTION,
of capital moneys under S. L. Acts, 464
of trust and mortgage estates in land, 657, n.

DIGNITY,
settlement of chattels to accompany, 511
shifting clause on accession to, 499 *et seq.*

DISCRETION,
as to application of income after husband's bankruptcy, 286
investment, absolute, how far protects trustees, 280
maintenance of children, 308

DISENTAILING ASSURANCE,
acknowledgment of, 522
bankruptcy of tenant in tail, 536
consent of protector to, 530 *et seq.*
enrolment of, 532, 782, n.

DISENTAILING ASSURANCE—*continued.*
copyholds, 524, 790, n.
covenant to execute, enforcement of, 534
enrolment of, 524
entailed money, 535, 536
equitable estate tail, 523, 524, 790, n.
jurisdiction excluded, 533
fines and recoveries, effect of, 521
freeholds, 521 *et seq.*
infant tenant in tail, 152
married woman tenant in tail, 522
mortgage not convenient, for effecting, 535
name and arms clause defeated by, 536
parcels, description of, 535
protector of settlement, 525 *et seq.*
appointment of, 528, 529
copyholds, 532
curtesy, 525
equitable estate, 526
incumbrances, 525
lessee dowress, &c., excluded, 528
lunatic, 529
married woman, 527
several owners of prior estate, 526, 527
term of years, 526
quasi entail of estate *pur autre vie*, 538
rectification of, 534
restraint on anticipation, 523
Statute of Limitations, 537

DISTRESS,
power of, not necessary to secure jointure, 386, 694, n.

DIVORCE,
compromise of proceedings for, supports separation deed, 93
modification of settlements by Court on, 316, 317

DOWER,
adultery causes forfeiture of, 359
barred by jointure, whether, 694, n.
definition of, 358
distinctions between, and curtesy, 362
expired estates tail, 370, 371
nature and extent of, 359, 360
release of, good consideration for settlement, 175

DRAINAGE,
improvement within S. L. Acts, 467

EASEMENTS,
statutory power to lease, 450, 456
to purchase, 462
to sell, 447, 456

EAST INDIA STOCK,
investment of trust funds in, 256

ECCLESIASTICAL COMMISSIONERS,
consent of, to leases by incumbents, &c., 854, n.
leases by, renewals of, 505, 506

ECCLESIASTICAL CORPORATIONS,
leases by, for agricultural purposes, 849, n.
for building purposes, 854, n.

ELDEST SON,
order for maintenance of, may take into account provision for younger children, 310
separate advice to, on settlement, 382

ELECTION,
ademption and satisfaction, 428
to confirm settlement, 147

ENFRANCHISEMENT,
statutory power of, 448, 449
raising money for, 456

ENGLAND,
capital moneys arising from settled land in, 465
exchange of, settled in, 449
meaning of, in Acts of Parliament, 448, n.

ENGLISH CONTRACT,
meaning of term, 162

ENLARGEMENT
of base fee, 531
of long term of years, 461, n.

ENROLMENT
of deed relating to copyholds, 458
deeds appointing protectors, &c., 529
disentailing assurance, 524
licence to copyholders to lease, 455
protector's consent, 532

EQUITY OF REDEMPTION,
settlement of, voluntary, 169

EQUITY TO SETTLEMENT,
doctrine of, 214, 215

ESTATE FOR LIFE,
limitation of, in personal settlement, 284 *et seq.*
in real settlement, 387 *et seq.*
statutory powers attached to. See "*Tenant for Life.*'

ESTATE *PUR AUTRE VIE*,
quasi entail of, 538

ESTATE TAIL,
bar of, 520 *et seq.*
And see "*Disentailing Assurance.*"
break of descent, 434 *et seq.*
for public services with reversion in Crown, 491, 492, 522, n
Inheritance Act, 434
in personal estate, none, 511
"issue," meaning of, in marriage articles, 432
in wills, 433
limitation of, in real settlement, 432 *et seq.*
of married woman *ex provisione viri*, 372
"purchase," definition of term, 433

ESTOPPEL,
by representations as to settlement, 212

EVASION OF SETTLED LAND ACTS,
provisions for, void, 487

EVIDENCE,
by recitals, after 20 years, 384
of Chancellor's consent to bar of entail, 530
to explain release, 28, 46
prove consideration for separation deed, 94

EXCHANGE,
notice of intention to make, 481
power for limited owner to make, 448
to raise money for, 456
settled land in England, 449

EXCHEQUER BILLS,
investment of trust funds in, 258

EXECUTORS,
assent of, 808 *et seq.*, nn.
And see "*Assent.*"
married woman, 810, n.
release by, 30, 36, 37
to, whether must be given, 49

FAMILY ARRANGEMENTS,
for resettlement, how far supported, 378 *et seq.*

FATHER,
agent of daughter to bind her settlement, 211
exercise of influence by, on resettlement, 379
representations as to settlement enforced against, 214

FEE FARM RENT,
power for Court to authorise leases at, 451

FEE SIMPLE CONDITIONAL,
alienation of estates in, abolished by Stat. *De Donis*, 372

FELON,
incompetent to settle property, 161

FINES,
bar of entail by, 521, 523
creation of, 372
definition of, for purposes of S. L. Acts, 466
on grants of leases under Ecclesiastical Leasing Acts, 855
under S. L. Acts, 444
on licences for leasing copyholds, 455, n.

FIRE INSURANCE,
statutory power for trustees to effect, 398
tenant for life not bound to effect, 397

FOREIGNER,
settlement on marriage with, 162 *et seq.*

FORFEITURE,
of leases, relief against, 860, n.
on alienation, charging order causes, 288
defeazance of gift over does not avoid, 288
whether extends to bankruptcy, 289
on bankruptcy, 285 *et seq.*
on exercise of powers under S. L. Acts, none, 488

FRAUD,
on creditors of settlors, 176 *et seq.*
See "*Voluntary Settlement.*"
on marital rights of husband, 251, 254
release, effect of, obtained by, 42, 43
separation avoided by, 99

FRAUDS, STATUTE OF. See "*Statute of Frauds.*"

FRAUDULENT SETTLEMENT. See "*Voluntary Settlement.*"

FREEBENCH,
widow's right to, in copyholds, 361

FREEHOLDS,
brought into settlement, how, 216 *et seq.*
covenants for title by settlors, 217 *et seq.*
And see "*Covenants.*"
"grant," use of word in conveyance of, 217
mortgaged property, 220
strict settlement, 223, 224
And see "*Real Settlement.*"
trust for sale of, 224 *et seq.*
And see "*Trust for Sale.*"
disentailing assurance of, 521 *et seq.*
And see "*Disentailing Assurance.*"

FURNITURE,
agreement for purchase of, on hire system, 803, n.

GAVELKIND,
widow's interest in husband's lands held in, 359

GIFT OVER,
defeasance of, does not avoid forfeiture on alienation, 288

GLEBE LANDS,
leases of, 849, n., 854, n.
not bound by judgments, 8, n.

GRANDCHILDREN,
power to appoint to children does not extend to, 299

GRANT,
assurance of freeholds by, 217, 373
resettlement by appointment and, 738, n.

GROUND RENTS,
valuation of freehold, on purchase by trustee of, 274

GUARDIAN,
consent of, to child's marriage, 303

HEIRLOOMS,
absolute vesting of, in tenant in tail, 511
mode of settlement of, 513 *et seq.*
sale of, under S. L. Acts, 479

HEIRS,
limitation to, of settlor, 433
release extends to, of releasee without words of limitation, 34
resettlement obtained by parental influence over expectant, 380
take as purchasers, when, 434

HOTCHPOT CLAUSE,
in personal settlement, 303, 304
insertion of, in advancement clauses, 314
"usual clause" for insertion in settlements, 205

HOTEL KEEPER,
custom for, to hold furniture on hire system, 803, n.

HOUSE PROPERTY,
valuation of, on mortgage to trustees, 273

HUSBAND,
absence of, necessary to separation, 95
after-acquired property of, covenant to settle, 320, 321
confirmation of settlement made in infancy by, 149
credit of, wife's authority to pledge, 102
income, receipt of wife's separate, by, 296
trusts of, for, 284 *et seq.*
loan of trust funds to, 279
payment of debts of, not advancement to wife, 313
release by, of money owing to wife, 29
representations as to settlement enforced against, 214
seisin of, not necessary to support dower, 360
ultimate trusts of personalty settled by, 315

IDENTITY,
statutory declaration as to, of parcels, 822, n.

ILLEGALITY,
of consideration, &c., avoids separation deed, 92, 94
of marriage, avoids right to dower, 359
prevents marriage from forming valuable consideration for settlement, 166

ILLEGITIMATE CHILDREN,
ademption as regards, 430
whether within consideration for settlement on mother's marriage, 172

ILLUSORY APPOINTMENT,
not now impeachable, 300

IMPROVEMENT OF LAND,
application of capital moneys under S. L. Acts in, 461, 466 *et seq.*, 471
charges for, how effected, 456, n.

IMPROVEMENT OF LAND—*continued.*
charges for investment of trust funds in, 260
railways, canals, &c., 469, n., 473, n.
redemption of, 466
whether incumbrances, 267, n.
maintenance of, obligations of tenants for life, &c., as to, 473
residence, erection of by limited owner, 467, n.
timber, &c., planted for, not to be cut, 473

INCOME,
apportionment of, 281, 282
arrears of, recovery of, 296
covenant by man to settle after-acquired property does not extend to, 321
trusts of, in personal setttlements, 284 *et seq.*

INCOME TAX,
words "without deduction," whether sufficient to exclude, 689, n.

INCORPOREAL HEREDITAMENTS,
land, in Acts of Parliament, includes, 441, n.

INCUMBRANCES,
discharge of, out of capital moneys, 459
land improvement charges are not, 267, n.
protectorship of settlement not affected by, 525
rights of incumbrancers not to be affected by sales, &c., under S. L. Acts, 486
transfer of, on sales under S. L. Acts, 460

INDEMNITY,
against debts of wife on separation, 93, 112
rents and lessees' covenants, 71, n.
release, when should be accompanied by, 51
statutory, of trustees, 272, 343

INDIAN STOCKS,
investment of trust funds in East India Stock, 256
in railway stocks, &c., 258

INFANT,
absolutely entitled, as tenant for life under S. L. Acts, 494
appointment of person to exercise statutory powers on behalf of, 494
assent by administrator *durante minore ætate* of, 810, n.
confirmation of contract by, writing necessary to, 151
custody of, on separation, 109 *et seq.*
disentailing assurance by, 152
maintenance, &c., out of income of shares, 301
And see "*Maintenance.*"
marriage of, consents of parents, guardians, &c., to, 303

INFANT—*continued.*
release by, void, 48
settlements by, or on behalf of, 143 *et seq.*
avoidance of, generally, 144
confirmation of, 148 *et seq.*
And see "*Confirmation.*"
covenant by adult wife to settle her realty, 144
election, doctrine of, 148, 149
exercise of powers by infant, 154
Infants' Settlement Act, 151 *et seq.*
jurisdiction of Court to compel infant to make settlement, none 144, 155
jurisdiction of Court over its wards, 144, 156
marriage where both parties are infants, 144
husband is infant, 144
wife is infant, 144 *et seq.*
married woman's property in Court, 150
representations on behalf of, when enforceable, 213
restraint on anticipation, 148
settlement by third party does not validate, 146
voidable not void, 148

"INSOLVENCY,"
meaning of, 289, 290

INSURANCE
against fire, see "*Fire Insurance.*"
of lives, see "*Life Assurance.*"

INTEREST
on portions, 411

INVESTMENT OF TRUST FUNDS,
authorised by statute, 255 *et seq.*, 794 *et seq.*
bank stock, 256, 795
Colonial Government stocks, 259
consolidated annuities, 258
consolidated stock, 258
debenture stock, 262, 795
debentures of water companies, 795, 799
East India Stock, 256, 795
exchequer bills, 258
improvement of land charges, 260
India railway stocks, &c., 258, 795, 798
Irish securities, 263
Isle of Man loans, 263
leasehold securities, 265
local loans stock, 263
Metropolitan consolidated stock, 262, 795
mortgage debentures, 261

INVESTMENT OF TRUST FUNDS—*continued.*
authorised by statute—*continued.*
mortgages, 256, 259, 795
municipal securities, 796, 799
nominal debentures, &c., 262, 796
parliamentary stocks and public funds, 795
securities authorised by order of Court, 257, 796
guaranteed by Parliament, 256, 795
stock, ordinary, of leased undertakings, 795
express clauses as to, 264 *et seq.*
advisability of inserting, 264
of not inserting unduly wide, 264, 265
discretion as to, absolute, effect of, 280
to continue existing, 282
mortgage, contributory, 268, 279
of copyholds, 269
ground rents, 269
leaseholds, 265, 266
life interest and policy, 268
preference shares or stock are not "securities," 270
railway debentures, &c., 270
second, 267
speculative property, 266, 267, 281
turnpike bonds, 269, 270
subject to proviso not to call in principal, 268
prohibition of other than expressly authorised, 260, 800
"real securities," meaning of, 265, 269
generally,
duties of trustees as to, 270 *et seq.*
advice of Court, 281
agents, employment of, 271
apportionment of income on change of investment, 281, 282
contributory mortgage, 268, 279
delegation of trust, 272
discretion as to retaining investments, 282
house property, 273
improper, liability for loss by, 283, 284
loan on personal security, 279
to co-trustee, 279
mixing trust funds, 279
proportion of advance to value of property, 273, 277
solicitor, employment of borrower's, 279
stock mortgage, 280
surveyor, choice and report of, 275, 276
title, investigation of, 274, 275, 278
valuation of property, 270
valuer, trustees should choose their own, 271, 276
varying investments, 283
weekly tenants, property let to, 273
"usual clause," meaning of, in marriage articles, 206

IRELAND,
charitable purposes, gifts to, 872
infants' settlements, 152, 213
investment of trust funds on real securities in, 263, 797, 799
life assurance, 244, n.
registration of land in, 17, 18
S. L. Acts, 498, 499

IRRIGATION,
an improvement within S. L. Acts, 467

ISLE OF MAN,
investment of trust funds on loan in, 263

ISSUE,
birth of heritable, necessary to curtesy, 363
power to appoint to, in personal settlement, 299
term, meaning of, 433
trusts for, 299 *et seq.*
in default of, 315 *et seq.*

JOINTURE,
apportionment of, 402
bar of dower, 400
limitation of, 401 *et seq.*
payment of, "without any deduction," meaning of, 402
power of charging, not "usual" in settlements, 206
settlement under, 763, n.
release of, acknowledgment of, when necessary, 739, n.
as to part of lands charged, 403
separation deed supported by consideration of, 93
remedies for recovery of, 386, 694, n.
restraint on anticipation, 401
term to secure, unnecessary, 694, n.

JUDGMENT
creditor, not a purchaser within 27 Eliz. c. 4, 169
glebe lands not bound by, 8, n.
registration of, in Middlesex, 8, n.
release of, 28

JURISDICTION,
equitable, exclusion of, under Fines and Recoveries Act, 533
over wards of Court, 144, 156 *et seq.*

LAND,
meaning of, in Acts of Parliament generally, 441, n.
in S. L. Acts, 441

LAND TAX,
application of capital moneys to redemption of, 459

LANDS CLAUSES ACTS,
application of moneys in Court as capital moneys, 476
to enfranchisement, 461, n.
moneys paid for lease or reversion, 478, n.
payment out to trustees of settlement, 462, n.
sale by trustees under, 336

LAPSE (Wills Act, s. 33),
appointment by will to child not protected from, 299
covenant to settle after-acquired property does not include property protected from, 332

LEASE,
generally,
by corporation, memorial of, 3, n.
by ecclesiastical persons, &c., 849, n., 854, n.
forfeiture, relief against, 860, n.
indemnity against rents, &c., on assignment of, 71, n.
renewal of, 505 *et seq.*
under S. L. Acts,
apportionment of rent on partial surrender, 454
building, definition of, 446
regulations respecting, 450 ; see Vol. III., pp. 28 *et seq.*
variation of, 451
contract for power to enter into, 475
fines on grant of, 444
general power to grant, 450
for special objects, 453
restriction as to mansion house, &c., 455
licence to copyholder for leasing, 455
mining, definition of, 446
part of rent to be set aside, 452
regulations respecting, 450 ; see Vol. III., pp. 28 *et seq.*
variation of, 451
notice of intention to make, 481
option for lessee to purchase reversion, 664, n., 707, n.
surrender and grant of new, 454

LEASEHOLDS,
duties of trustees as to, 349, 350
equitable tenant for life of, 398
investment of trust funds on security of, 265, 266
settlement of, in trust for sale, 236
on trusts corresponding to uses in strict settlement, 511 *et seq.*
under S. L. Acts, 465

LEASEHOLDS—*continued.*
title of lessor, production of, 278
trusts for renewal of, 505 *et seq.*
And see "*Renewal of Leases.*"
voluntary settlement of, when void against purchaser, 169

LEGACY
adeemed, not restored by codicil, 427
contingent, statutory powers of maintenance, &c., whether apply to, 306

LETTERS,
agreement for settlement by, 204
rectification of settlement on evidence of, 211

LICENCE TO LEASE,
statutory power to grant to copyholder, 455

LIFE ASSURANCE, POLICY OF,
assignment of, bonuses included in, 245
notice of, 245
power of attorney not necessary on, 246, 247
stamp duty on, 543
insurable interest in, 244
investment of trust funds on security of, 268
maintenance of, liability of trustees as to, 347
policy monies, company not trustee of, 247
married woman's right to, 138
power to sell, advisability of giving to trustees, 347
settlement of, modes of, 244 *et seq.*
conditions of policy should be ascertained, 245, n.
covenants for keeping up, 248, 249
for title to, 248
declaration of trusts by reference, 248
delivery of policy to trustees, 249
in names of trustees or settlor, 245
protection of trustees, 249
under Married Women's Property Act, 138

LIFE INTEREST,
alienation of, whether husband can restrain in his own property, 284, 285
first, who takes, in personal settlement, 284
in real settlement, 387

LIFE TENANT. See "*Tenant for Life.*"

LIMITED OWNERS,
powers of, under S. L. Acts, 491 *et seq.*
infants, 494
lunatics, 496
married women, 495

LOAN
by wife to husband, 136
of trust funds on personal security, 279
proportion of, to value of property, 273 *et seq.*

LOCAL LOANS STOCK,
investment of trust funds in, 263

LONG TERMS,
mortgages on security of, by trustees, 265

LUNATIC,
incompetent to settle property, 159
married woman, election to take under settlement on behalf of, 150
protector of settlement, 530
tenant for life under S. L. Acts, 496
notice by committee of, of intention to sell, &c., 484

MAINTENANCE,
charge on infants' real estate for, 310, 311
discretion of trustees as to, 308, 309
express powers or trusts for, in settlements, 307 *et seq.*
insertion of, in powers of appointment, 301, 302
father maintaining child, whether purchaser of fund applicable to, 308
order for, notwithstanding trusts for accumulation, 310
statutory power of, 304 *et seq.*
contingent interest or legacy, whether within, 305, 306
out of income of land, 309

MANAGEMENT,
powers of, not now generally necessary in real settlements, 694, n.
timber cut in due course of, 392

MANSION HOUSE,
restriction on sale of settled, 455

MANOR,
definition of, for purposes of S. L. Acts, 446
power to sell seignory of, 448

MARRIAGE,
advancement by payment to daughter on, 312
agreements in consideration of, within Statute of Frauds, 201
And see "*Marriage Articles.*"
consents of parents, guardians, &c., to infants, 303
consideration of, valuable, 166
whether children of former or future marriage are within, 171 *et seq.*
means valid marriage, 166, 255
of infants, settlements on, 143 *et seq.*
part performance of parol agreement for settlement, whether, 202 *et seq.*, 213
personal settlements on, form and contents of, 250 *et seq.*
representations on, how far binding, 211 *et seq.*
second, power to make settlement on, 611, n.
real settlements on, form and contents of, 374 *et seq.*
trusts till, in personal settlement, 254, 255
uses till, in real settlement, 384

MARRIAGE ARTICLES,
ambiguous, approved form of trusts where, 196
construction of, generally liberal, 195
discrepancy between settlement and, 207 *et seq.*
executory trusts, how construed, 197 *et seq.*
articles and wills, distinction between, 198
"heirs female of body," 199
"issue," 199, 432
rule against perpetuities, 200
rule in Shelley's case, 198
tenancy in common substituted for joint tenancy, 198
form of, 200 *et seq.*
agreement must be complete, 204
consideration must be stated, 204
fraud, relief in equity against, 202
parol promise to settle void, 201
part performance, 202 *et seq.*, 213
postnuptial memorandum of antenuptial parol agreement, 205
solicitor's proposals for settlement, 204
Statute of Frauds requires writing and signature, 201, 204
"upon consideration of marriage," meaning of, 201
"usual clauses" to be inserted in settlement, what are, 205 *et seq.*

MARRIED WOMAN,
acknowledgment by, of disentailing assurance, 522
of release, 65, n.
of settlement of land, 132, 150
bare trustee, conveyance by, 141, n.
confirmation of settlement made in infancy by, 149
disentailing assurance by, 522

MARRIED WOMAN—*continued.*
equity to settlement of, 214, 215
grant by, for building church, &c., 133, n.
lunatic, election to take under settlement on behalf of, 150
Malins' Act, 132, 296
powers exerciseable by, 132
under Settled Land Acts, 495, 496
protector of settlement, 527
realty, limitation of first life interest to, in, 387
release by, restrained from anticipation, 48
settlements by, 131 *et seq.*
tenant for life, powers of, under S. L. Acts, 495, 496

MARRIED WOMEN'S PROPERTY ACT, 1882,
accruer of title of married woman, 136, n.
acquisition, holding and disposal of property, 104, 133, 136, 185
antenuptial debts, &c., liability as to, 139
bankruptcy laws apply to married women trading, 135
breach of trust by married woman, 140
contracts by married women, 134, 135
covenants for title by married women, 223
devolution of wife's property on her death, 133, n.
equity to settlement, how affected by, 214, 215
execution of general powers, 136
executrix or administratrix, 140
infants' settlements, effect of Act on, 145, 151, 158
investments, fraudulent, with husband's money, 137
in joint names of married women and others, 137
judgment against a married woman, 134, n.
legal proceeding by, or against, 140, 223
life assurance, monies payable under policy of, 138
loans by wife to husband, 136
maintenance of husband, children, &c., liability for, 143
remedies for protection of separate property, 139
restraint on anticipation, 142
settlements not affected by, 141
stock in name of, or transferred to married woman, 137
trusteeship of married woman, 140

MAXIMS,
Ex turpi contractu actio non oritur, 166
Expressio unius est exclusio alterius, 37
Impotentia excusat legem, 363

MEMORIAL,
attestation of, 3
certificate of, 9
contents of, 2, n., 4, 9, 10
description of parcels in, 5

MEMORIAL—*continued.*
lithographed is "in writing," 3, n.
of assent of executor, 6, n.
of deeds, &c., in Middlesex to be registered, 2, n.
in Yorkshire, 9, 10
of judgments, 8
of leases, 7
of wills, 4, 6
practice of registry office as to, in Middlesex, 2, n.

METROPOLITAN DISTRICT,
commons, &c., regulation of, 841 *et seq.*, nn.
police fund, 798

METROPOLITAN STOCK,
investment of trust funds in, 262, 798

MIDDLESEX REGISTRY. See "*Registry Acts.*"

MINES,
right of tenant for life to work, 394
statutory power to lease, 450
to reserve on enfranchisement, 448
on sale, &c., 449
to sell apart from surface, 456
setting aside rent under lease of, 452
trial pits for, are improvements under S. L. Acts, 470

MINORITY,
management during, 694, n.
trusts for accumulation during, 304, 306

MISTAKE,
memorial not affected by clerical, 16
payment of sale moneys to tenant for life, 391
release obtained by, 43
settlement, rectification of, on ground of, 209
setting aside family, of realty, for, 379

MOLESTATION,
covenant against, in separation deed, 105

MONTH,
meaning of, in Acts of Parliament, 481, n.

MORTGAGE,
assignment of, trusts not disclosed on, 237
consolidation, against settled property, none, 169
second mortgages relieved from risk of, 268

MORTGAGE—*continued.*
covenants for title by settlor of property subject to, 220
on assignment of debt, 565, n.
debt, mode of settling, 237, 238
discharge of, certificate of, in Middlesex, 7
for enfranchisement, &c., under S. L. Acts, 456
improvement of settled land, 456, n.
raising portions, 410
investment of trust funds on, 261, 265 *et seq.*
contributory mortgage, 268, 279
house property, 273
solicitor, employment of borrower's, 279
surveyor, choice and report of, 275, 276
title to property, 274 *et seq.*
value of property, 270 *et seq.*
weekly tenants, property let to, 273
notice of intention to, under S. L. Acts, 483
of settlement of, to be given to mortgagor, 565, n.
voluntary settlement defeated by subsequent, 168

MORTGAGE DEBENTURES,
investment of trust funds on, 261

MORTGAGEE,
conveyance by, of mortgage debt "as mortgagee," 565, n.
of tenant for life, rights of, under S. L. Acts, 486

MORTMAIN,
chapel, conveyance of land for, 862 *et seq.*, nn.
Mortmain and Charitable Uses Act, 1888, 868 *et seq.*, nn.
"real securities," what are, 269

MUNICIPAL SECURITIES, &c.,
investment of trust funds on, 262, 796

NAME AND ARMS CLAUSE,
contingent remainders, limitations to preserve, in, 400
disentailing assurance defeats, 536
nature and form of, considered, 502, 503

NEXT OF KIN,
trust for, of wife surviving, 318 *et seq.*

NOMINAL DEBENTURES,
investment of trust funds on, 262

NOTICE,
of intention to exercise powers under S. L. Acts, 481 *et seq.*
settlement of bond debt, 580, n.

NOTICE—*continued.*
settlement of debts generally, 240, 241
of life policy, 245
of mortgage debt, 565, n.
of portion, 572, n.

OPEN SPACES,
regulation of, in Metropolitan district, 842, n.

OPTION,
to lessee to purchase reversion under S. L. Acts, 664, n., 707, n.

ORDER OF COURT,
cash under control of Court, 257

PARCELS,
description of, in disentailing assurance, 535
in memorial in Middlesex, 5, n.
identity of, statutory declaration as to, 822, n.

PARENT,
ademption by, 429
consent of, to child's marriage, 303
resettlements obtained by improper influence of, 379 *et seq.*

PARTIES,
to releases, who should be, 50, '65, n., 78, n.
strangers cannot take benefit of release, 32, 33
to separation deed, who should be, 103
to settlements, personal, 251, 252
real, 383

PARTITION,
power of, under S. L. Acts, 448
notice of intention to exercise, 481 *et seq.*
regulations respecting exercise of, 449
transfer of incumbrances, 450
power to contract for, 475
to convey on, 457
to raise money for, 456

PEDIGREE,
statutory declaration on matters of, 824, n.

PERPETUITIES, RULE AGAINST,
personalty in strict settlement, 513
powers of appointment, 546, n.

PERSONAL PROPERTY,
modes of bringing into settlement different kinds of, 237 *et seq.*

PERSONAL SECURITY,
trustees should not lend on, 279

PERSONAL SETTLEMENT,
distinction between, and real settlement, 127
form and contents of, 250 *et seq.*
And see *Table of Contents.*

PIN-MONEY,
annuity for, limitation of, 384, 386
arrears of, how far recoverable, 385
assignable, whether, 386
definition of, 385
misconduct does not deprive wife of, 386
savings out of, not separate estate of wife, 385
term for raising not now necessary, 386

PLANTING,
an improvement within S. L. Acts, 468

POLICY. See "*Fire Insurance*," "*Life Assurance.*"

PORTIONS,
ademption, 418 *et seq.*
And see "*Ademption.*"
advancement by, 313, 415
advancement clause as to, 415
costs of raising, 414
definition of, 417
double, presumption against, 416 *et seq.*
"eldest son," meaning of, 404 *et seq.*
first charge on settled land, 405
fraud on power of appointing, 408
fund contingently raisable, 407
hotchpot clause, 414
interest, whether to be payable on, 411
maintenance, 414
mode of raising, 410
powers usually inserted as to, 414
provision by father on child's marriage, 417
by will, 418
satisfaction, 418 *et seq.*
And see "*Satisfaction.*"
settlement of, 238, 239
shifting clauses distinguished from exclusion clauses, 406

PORTIONS—*continued.*
suspension of, 413
term to secure, limitation of, 403
testamentary provision, when a, 418
time for raising, 404, 412
of vesting of, 407
where "eldest son," &c., to be ascertained, 409
vesting of, rules as to, 408, 409

POSSESSION,
meaning of, in S. L. Acts, 445

POWERS,
generally,
exercise of, by bankrupt, 160
by infant, 154
by married woman, 132
of advancement, 311 *et seq.*
appointing new trustees, 112, 339, 867, n.
protector of settlement, 528 *et seq.*
trust funds, 299 *et seq.*
And see "*Appointment, Power of.*"
apportioning blended funds, 357
attorney. See "*Attorney, Power of.*"
charging jointure,
portions,
giving receipts, 335 *et seq.*
investment expenses, 264 *et seq.*
statutory, 255 *et seq.*, 794 *et seq.*
leasing, 228, 659, n.
managing property, 228, 675, n.
purchasing land, 586
revocation of voluntary settlement, 180
sale, how exerciseable, 225
mistaken payment to tenant for life, 391
withdrawal of funds from settlement, 334
preservation of, on resettlement, 377
release of, 58, n.
under S. L. Acts. See also "*Tenant for Life.*"
additional or larger, 491
assignment of, void, 486
conflict of, 489
contract not to exercise, void, 486
cumulative, 489
during infancy, 494
lunacy 484, 496
equitable tenant for life, 441, n.
exercise of, from time to time 489
forfeiture not occasioned by, 488

POWERS—*continued.*
under S. L. Acts—continued.
exercise of prohibition of, void, 487
rights of assignees, incumbrances, &c., as to, 485
express powers by trustees, consent of tenant for life to, 231, 490
limited owners having, of tenant for life, 491 *et seq.*
married woman, 495, 496
release of, void, 486

PRESENTATION
to benefice, 848, n.

PRINCIPAL,
release of, discharges surety, 37

PRIORITY
of assurances, &c., under Registry Acts, 2, 12, 17
of wife's equity to settlement, 215

PROBATE,
assent to legacy before, 811, n.
duty, testamentary appointment liable to, 641

PROCEDURE
under S. L. Acts, 485

PROFESSIONAL SERVICES,
power for trustee to charge for, 352 *et seq.*

PROTECTION
of purchasers under S. L. Acts, 489

PROTECTOR OF SETTLEMENT,
bare trustee, 526, 528
consent of, to barring entail, 527, 530
to enlargement of base fee, 531
lunatic, 530
married woman, 527
undivided shares, 526

PUBLIC FUNDS,
investment of trust funds in, 258
settlement of stocks in, how effected, 241, 242

PURCHASE,
definition of, 433
from wife good consideration for settlement, 175
power to, with capital moneys under S. L. Acts, 459, 461, 462
settlement of lands purchased, 465

PURCHASERS,
protection of, under S. L. Acts, 489
voluntary settlement void as against, 167 *et seq.*
And see "*Voluntary Settlements.*"

QUIT RENT,
redemption of, with capital moneys under S. L. Acts, 459

RAILWAY,
construction of, by limited owners, 469, 473, n.
investment of trust funds in securities, &c., of, 259, 795

REAL ESTATE,
assent of executor not necessary to devise of, 810, n.
investment on mortgage of, 261, 265 *et seq.*

REAL SETTLEMENT,
family arrangements, 376 *et seq.*
limitations in, 384 *et seq.*
And see *Table of Contents.*
marriage, 374 *et seq.*
origin and history of, 371 *et seq.*
parties to, 383
recitals in, 384
several sets of trustees, whether advisable, 688, n.
trustee clauses in, 517 *et seq.*
appointment of trustees by Court, 518
declaration as to "trustees of the settlement," 518
number of trustees to act, 518
protection of trustees, 519, 520
receipts, 519
reimbursement, 520

RECEIPTS,
assignee with power to give, need not give a release, 47
by trustees generally, 335 *et seq.*
trustees of settlement under S. L. Acts, 519

RECITALS,
discrepancy between, and general words of release, 44 *et seq.*
and operative part of settlement, 253
evidence by, after 20 years, 384
when advisable in release, 50
separation deed, 104
settlements of personalty, 252
settlements of realty, 386

RECONCILIATION,
proviso as to, in separation deed, 112

RECOVERY,
common, effect of, in barring entails, 521
of settled land, proceedings for, 479

RECTIFICATION OF SETTLEMENT,
delay in claiming, 210
discrepancy between articles and settlement, 207
evidence required for, 208 *et seq.*
execution of settlement under protest, 209
mistake, 209
onus of proof, 211
voluntary settlement, 192

REGISTRY ACTS,
generally,
appointment under a power, 15
assignment of unregistered lease, 15
clerical error does not affect memorial, 16
dealings with land itself only within, 18
equitable mortgage, 18
non-registration of wills cured in certain cases, 14
notice, 16 *et seq.*
title by act of law not excluded by unregistered conveyance, 17
Bedford Level,
conveyances and charges to be registered, 2, n.
wills not within, 2, n.
Ireland,
further charge without notice of puisne mortgage, 17
marriage settlement of leaseholds, 18
Middlesex,
appointment of registrars, 3
certificate of discharge of mortgages to be registered, 7
City of London not within, 7, n.
copyholds not within, 7
memorial, attestation of, 3
certificate of, 9
contents of, 2, n., 4
description of parcels in, 5
of assent of executor, 6, n.
deeds generally, execution of, 3
judgments, 8
leases, 7
wills, execution of, 4
time for registration of, 6
not material as against grantor, &c., 2, n.
priority of assurances and wills, 2

REGISTRY ACTS—*continued.*
Yorkshire,
appointment of registrars, 9
assurances and wills to be registered, 9
caveats, 11
certified copies of documents, 14
copyholds not within, 14
Crown lands not within, 14
derivative title, 13
leaseholds under 21 years not within, 14
legal estate and tacking no protection, 13
memorials, regulations as to, 9, 10
notice of wills not proved, 11
registration is not, 13, 17
priority of assurances and wills, 12
production and endorsements of deeds and wills, 10
registration, mode of, 9
order of, 13
searches, 14
shares in companies, &c., not within, 14
unstamped instruments, 14

RELEASE,
acknowledgment by married woman of, 65, n.
costs of, by whom borne, 49
definition of, 26
evidence, admissibility of, to explain, 28, 46
executor, whether entitled to release, 49
extent of, 35 *et seq.*
by executor or administrator, 36, 37
compromise of doubtful rights, 44
fraud, effect of, 42, 43
ignorance of rights, effect of, 43
of debt discharges all securities, 38
of demands not yet due, 39
of part of lands charged with rentcharge, 39
of principal discharges surety, 37
operates up to the date or delivery, whether, 40
oppression, effect of, 44
where made in a particular right, 37
form and contents of deed of, 49 *et seq.*
deed poll or indenture, 50
operative part, 51
parties, 50, 65, n., 78, n.
recitals, 50, 52, n., 70, n.
schedule of accounts, 51
general words of, how far controlled by recitals, 44 *et seq.*
judgment, how released, 28

RELEASE—*continued.*
of debts by will, assent of executor whether necessary to, 808, n.
dower, good consideration for settlement, 175
jointure, acknowledgment of, when necessary, 739
powers generally, 58, n.
under S. L. Acts, void, 486
rentcharge as to part of lands charged, 39, 60, n., 403
stamp duty on, 51
trustees, whether entitled to, 47 *et seq.*
assignee with power to give receipts need not give, 47
final distribution of trust funds, 47, 48
infant incapable of releasing, 48
married woman restrained from anticipation, 48
protection by order of Court for payment, 47
trustees of subsequent settlement not bound to give, 48
what amounts to, 26 *et seq.*
cancellation of deed, 28
covenant not to sue, whether, 27, 35
deed, whether necessary to, 27
proper words of release, 26
who may release, or otherwise, 29 *et seq.*
assignor of covenant running with land, 31
executors and administrators, 30
husband as to money owing to wife, 29
lessor of plaintiff, 31
obligee after assignment, 31
obligees, one of several joint, 31
releasor bound though not a party, 33
who may take advantage of, 33 *et seq.*
heirs of releasee, where no words of limitation, 34
several co-debtors discharged by release to one, 34, 35
co-trustees, 35
stranger cannot claim benefit of release, 32, 33

REMAINDERS,
contingent, limitations to trustees to preserve, 398 *et seq.*
cross, in tail, 432
to settlor's "right heirs," 433

RENEWAL OF LEASES.
apportionment of costs of, 505, 508
fines on, out of what fund payable, 510
impossibility of obtaining, 506
powers of trustees as to, 506 *et seq.*
tenant for life not bound to obtain, 505

"RENT,"
definition of, for purposes of S. L. Acts, 445

RENT—*continued.*
mining, setting aside part of, under S. L. Acts, 452
redemption of chief, quit, crown, &c., with capital moneys under S. L. Acts, 459
royalty included in, for purposes of S. L. Acts, 445

RENTCHARGE,
apportionment of, 402
limitation of, without any deduction, 402, 689, n.
release of part of lands charged with, 39, 60, n., 403
remedies for recovery of, 386, 694, n.

RENTS AND PROFITS,
accumulation of, during minorities, 309

REPAIRS,
building purposes include, within S. L. Acts, 446
by tenant for life no charge on inheritance, 397
of improvements under S. L. Acts, 474

REPRESENTATIONS,
obligation to settle on ground of, 211 *et seq.*
acquiescence, 213
against whom enforced, 214
estoppel, 212
marriage not part performance, 213
nature of, 213
writing necessary, 212

RESETTLEMENT,
appointment and grant to effect, 738, n.
family arrangements for, validity of, 379 *et seq.*
form and contents of, 376 *et seq.*
separate advice, when eldest son should have, 382, 383
terms of, must be just and reasonable, 381

RESIDENCE,
conditions as to, in settlements, 503 *et seq.*
erection of, by limited owner, an improvement, 467, n.
of incumbent not to be leased, 857, n.
restrictions of sale on principal, under S. L. Acts, 455

RESIDUE,
ademption by gift of, 424

REVERSION,
estates tail with, to Crown, 491, 492, 522, n.
of divorced wife, husband excluded from, 316

REVERSION—*continued.*
purchase of, under S. L. Acts, 461
release by husband does not extend to, of wife, 29
settlement of, how effected, 244

REVOCATION
of appointment, power of, 302
assent by executor, 811, n.
consent by protector of settlement, none, 531
voluntary settlement, 180

"RIGHT HEIRS,"
limitation to settlor's, 433

ROYALTY,
rent includes for purposes of S. L. Acts, 445

SALE,
powers of, under S. L. Acts, 447 *et seq.*
trust for, conveyance of realty on, 225 *et seq.*, 656, n.
conveyance by grantor "as settlor," 225
declaration of trusts of proceeds by reference to settlement of even date, 227
leave of Court to exercise statutory powers, 230, 662, n.
powers of leasing, 228, 659, n.
of management, 228, 675, n.
to appoint new trustees, 234
recitals, 225
trusts of proceeds of, settlement declaring, 234
trustees for, powers and duties of, 225 *et seq.*
as to mode of sale, 225
consent of tenant for life to exercise of powers, 231
depreciatory conditions, 226, 227
mistaken payment to tenant for life, 391
postponement of sale, 226
statutory powers of tenant for life not to override, 232 *et seq.*
"trustees of the settlement" for purposes of S. L. Acts, 234

SATISFACTION,
ademption more easily presumed than, 419
differences, what, sufficient to rebut presumption, 420 *et seq.*
donor must be parent or *in loco parentis*, 429, 430
election, 427
gift of residue, 424
obligation to pay is essential to, 428

SECURITIES,
definition of, for purposes of S. L. Acts, 447
investment of capital moneys in, 463
of trust funds in, 255 *et seq.*
And see "*Investment.*"

SEIGNORY,
purchase of, under S. L. Acts, 461
sale of, under S. L. Acts, 448

SEISIN
of husband not necessary to support dower, 360
of wife generally necessary to curtesy, 363

SEPARATION DEED,
absence of husband necessary to, 95
adultery will avoid, 99
Apportionment Act applies to annuities under, 115, n.
breach of wife's covenants, effect of, 100
chattels should be delivered to wife before execution of, 115, n.
consideration necessary to support, 92 *et seq.*
compromise of divorce proceedings, 93
creditors not bound by voluntary separation, 93
curtesy, release of claim to, 94
distinction between deeds and executory agreements, 92
evidence *aliunde* admissible, 94
illegal considerations, 92
indemnity against debts, 93
maintenance, acceptance of, by wife, 93
of children, covenant for, 93
payment of costs, stipulation as to, 94
purchaser for value not bound by voluntary separation, 93
release of alimony jointure, &c., by wife, 93
marital claims to wife's property, 94
valuable, necessary to support executory agreement, 92
not imported by voluntary separation, 93
credit of husband, authority of wife to pledge, 102
determination and avoidance of, 98 *et seq.*
by adultery, 99
breach of covenant, 100
fraud, undue influence, &c., 99
reconciliation, 98
effect of, 100
trusts of property may continue notwithstanding, 98, 108
effect of, 100 *et seq.*
liability of husband for wife's debts, 101
license to commit adultery not given by, 101
marital rights over wife's property, 101
protection afforded by, 100

SEPARATION DEED—*continued.*
effect of, relation of parties, how affected by, 101
form and contents of, 103 *et seq.*
arrangement of clauses, 105
custody of children clauses, 109 *et seq.*
access of wife, 111
annuity for maintenance, 110, 111
control of Court over, 111
education, 111
removal abroad, 111
validity of, 109
further assurance, covenant for, 112
indemnity against wife's debts, 112
new trustees, power to appoint, 112
parties necessary to, 103, 104
property clauses, 107 *et seq.*
annuity for husband, 109
wife's maintenance, 107, 108
breach of wife's covenants, effect of, 108
dum casta clause, 107
husband's offer to resume cohabitation, effect of, 109
rights of wife under Statutes of Distribution, 109
recitals, when introduced, 104
reconciliation, proviso for, 112
separation clauses, 105 *et seq.*
condonation of past offences, 106
living apart, 105
molestation, 105
subsidiary clauses, 112
"usual clauses" in, what are not, 107, 114, n., 115, n.
validity of agreements for, 90 *et seq.*
generally, formerly deemed void, 90, 91
modern change of judicial opinion, 91, 92
illegal consideration will avoid, 92
illegal provisions and dispositions will avoid, 94 *et seq.*
marriage within prohibited degrees, 95
prospective separation, 95, 96
reconciliation and renewed separation, 97
testamentary gifts favouring separation, 95
living apart, covenant for, valid, 91, 105, 106
provisions as to custody of children valid, 109, 110

SEPARATE ESTATE,
curtesy whether excluded as to, 364 *et seq.*
infants' settlement of property held as not binding on wife, 146
savings out of pin money not, 385
voluntary settlement of property held to be, 175
what words formerly imported, 291

SETTLED ESTATES ACT,
powers of leasing, sale, &c., 437

SETTLED LAND,
definition of, for purposes of S. L. Acts, 441

SETTLED LAND ACTS,
anticipation, restraint on, 295, 495
apportionment of rent, 450, 454
assignee for value, 486
base fee, person entitled to, 492
building lease, 446, 450, 451, 456
capital moneys, application of, 463
arising from lease or reversion, 478
consideration for surrender, 454
conversion of,
definition of, 443
devolution of, 464
direction of tenant for life, 464
fines on grants of leases, 446
income of, 464
investment of, 463, 465
in land in England, 465
money in Court, 476
in hands of trustees, 477
payment of, to trustees or into Court, 463
to not less than two trustees, 518
costs out of, 463
under settlement on trust for sale, 230
Chancery Division, jurisdiction of, 485
charge for enfranchisement, &c., 456
notice of intention to make, 481
transfer of, 450
confirmation of lease, 454
consent of tenant for life, 231, 490
contracts by tenants for life, 475
conversion of capital moneys, 696, n.
copyholds, license to lease, 455
costs, payment of, out of capital moneys, 463
County Court, jurisdiction of, 485
curtesy, tenant by, 370
demesne lands, 455
drainage, 467
easements, lease of, 450, 456
purchase of, 462
sale of, 447, 456
enfranchisement, 448, 449
raising money for, 456
evasion of, 487
fines, 444, 455, n.

SETTLED LAND ACTS—*continued.*
forfeiture, 488
heirlooms, 479
improvements, 461, 466 *et seq.*
maintenance of, 473
incumbrancer, rights of, 486
incumbrances, transfer of, 460
infant, 494
investment of capital moneys, 463, 465
land, definition of, 441
leases, 450 *et seq.*
And see "*Leases.*"
limited owners having powers of tenant for life, 491 *et seq.*
lunatic tenant for life, 496
manor, definition of, 446
sale of seignory of, 448
mansion house, 455
married woman tenant for life, 495, 496
mines, reservation of, 448, 449
sale of, 456
setting aside part of rent of, 452
mining leases, 446, 450 *et seq.*
mortgage, power to, 456
mortgagee, rights of, 486
notice of intention to exercise powers, 481 *et seq.*
option to lessee to purchase reversion, 664, n., 707, n.
partition, power to, 448
planting, 468
possession, meaning of, 445
powers. See "*Power,*" "*Tenant for Life.*"
procedure, 485
purchase of lands, &c., 459, 461, 462
purchasers, protection of, 489
railway, construction of, 469, 473, n.
quit rent, redemption of, 459
receipts by trustees of settlement, 519
release of powers, void, 486
rent, definition of, 445
mining, setting apart, 452
repairs, building purposes include, 446
of improvements, 474
residence, conditions as to, how affected by, 504
sale, powers of, 447 *et seq.*
securities, definition of, 447
seignory, purchase of, 461
sale of, 448
settlement, definition of, 439
surrender of lease, 454, 746, n.
tenant for life, powers of, see "*Tenant for Life.*'
tenant in tail, 491

SETTLED LAND ACTS—*continued.*
timber, power to cut, 389, 474, 478
trust for sale, settlement on, 224
trustees of settlement, appointment of, 518
definition of, 443
notices to, 481, 482
payment to, 518
protection of, 519, 520
receipts of, 519
reference of differences by, 481
re-imbursement of, 520
water, supply of, 468, n.
wayleaves, leases, of, 450, n.
power to grant or reserve, 456
will, definition of, 447

SETTLEMENT,
advisability of, on marriage, 129
agreement for, is within Statute of Frauds, 201
alteration of, on divorce, 316, 317
bankruptcy, effect of, 160, 181, 284 *et seq.*, 576, n.
confirmation of, 147 *et seq.*, 223, 616, n.
consideration for, 164 *et seq.*
And see "*Consideration.*"
covenants for title, 217 *et seq.*, 254
created, how, 126
definition of, general, 127
in S. L. Acts, 439
distinction between real and personal, 127
divorce, effect of, 316
frame of, personal, 250 *et seq.*
real, in strict settlement, 383 *et seq.*
on trust for sale, 224 *et seq.*
fraud of creditors, 176 *et seq.*
marital rights, 251, 254
purchasers, 167 *et seq.*
Infants' Settlement Act, 151 *et seq.*
of after-acquired property, 320 *et seq.*
appointed fund,
chattels, 240, 241
chose in action, 242 *et seq.*
copyholds, 234 *et seq.*
foreign property, 163
heirlooms, 511 *et seq.*
land in strict settlement, 223, 224, 358 *et seq.*
And see "*Real Settlement.*"
on trust for sale, 224 *et seq.*
leaseholds, 236, 237
mortgage debt, 237, 238
personalty to go with settled land, 511 *et seq.*

SETTLEMENT—*continued.*
of policy of life assurance, 244 *et seq.*
portions, 238, 239
reversionary interest, 244
shares in companies, 242
stocks in public funds, &c., 241
undivided shares of personalty, 239
rectification of, 207 *et seq.*
representations as to, 211 *et seq.*
solicitor's proposals for, 204
stamp duties on, 540 *et seq.*
"usual clauses" in, what are, 205 *et seq.*
voluntary, 164 *et seq.*
And see "*Voluntary Settlements.*"
withdrawal of funds from, 334
who may make, 131 *et seq.*
absolute owners, 131
aliens, 160
disability of bankruptcy, 159 *et seq.*
of felony, 161
of infancy, 143 *et seq.*
And see "*Infant.*"
of lunacy, 159
married women, 131

SETTLOR,
conveyance as, covenants implied by, 219 *et seq.*, 254

SHARES
in companies, settlement of, 242
undivided, of personalty, settlement of, 239, 240
of realty, sale of under S. L. Acts, 448, 449

SHELLEY'S CASE, RULE IN,
marriage articles construed so as to defeat, 198
rectification of settlement so as to defeat, 209

SHIFTING CLAUSES
construed strictly, 499
contingent remainders, limitation to trustees to preserve, in, 400
distinction between, and exclusion clauses, 406
name and arms clauses, 502, 503
nature of, 499
residence, conditions as to, 503 *et seq.*
rules for framing, 499 *et seq.*
succession to title or estate, 499 *et seq.*

SOLICITOR,
borrower's, employment of, by trustee-mortgagee, 279
investigation of title by, on behalf of trustee, 274

SOLICITOR—*continued.*
proposals for settlement by, 204
receipt of money by, as agent of trustees, 336 *et seq.*
trustee, power of, to charge for professional services, 352 *et seq.*
valuer, selection of, not duty of, 271

STAMP DUTY,
assents by executors, 812, n.
bonds, &c., 542
presentation to benefice, abolished, 848, n.
releases, 51
settlements, 127, 540 *et seq.*
several matters in one instrument, 239

STATUTE OF FRAUDS,
agreement on marriage settlement is within, 201

STOCK,
assent to bequest of, 809, n.
mortgage, investment of trust funds on, 280
settlement of, 241

SUCCESSION DUTY,
advancements, 314
appointments by deed now liable to, 641
rentcharge payable free from, 402
voluntary settlements, 186

SURETY,
release of principal discharges, 37

SURFACE,
sales, &c., of, apart from minerals under S. L. Acts, 456

SURRENDER
of copyholds, by whom prepared, 686, n.
for barring entails, 524
of lease, power for tenant for life to accept, 454
where term has more than 12 months to run, 746, n.
of under-leases not necessary on grant of new lease, 856, n.

SURVIVOR,
power of appointment given to, 302

TENANT FOR LIFE,
generally,
equitable, of leaseholds, 398
first life interest in personalty, 284
in realty, 387

TENANT FOR LIFE—*continued.*
generally—continued.
forfeiture on alienation or bankruptcy, 284 *et seq.*
And see "*Alienation*," "*Bankruptcy.*"
improvements by, 397
loan of trust funds to, 279
married woman, restraint on anticipation by, 291 *et seq.*
mistaken payment to, of sale moneys, 391
obligations of, as to fire insurance, 397
as to renewal of leases, 505
as to repairs, 394 *et seq.*
repairs by, no charge on inheritance, 397
right of, to bonuses, 245
to mine produce, 394
to timber, &c., 388 *et seq.*
waste, impeachment of, 387 *et seq.*
under S. L. Acts,
additional or larger powers may be given to, 491
assignee or mortgagee of, rights of, 486
building leases, power to grant, 446, 450, 451, 456
consent of, to exercise of powers by trustees, 231, 490
concurrence by, in executing improvements, 472
in exercise of powers, 457
confirmation of leases by, 454
contracts for sale, &c., by, 475
copyholders, power to grant leasing licences to, 455
definition of, 441
direction of, as to investments, 464
enfranchisement by, 448, 449
raising money for, 456
equitable, 441, n.
exchanges by, 448, 450
execution of deeds, &c., by, 457
exercise of powers, 489
forfeiture, provision against, 488
gravel, &c., may be dug by, for repairs, 474
heirlooms, restriction on sale of, 479
improvements, application of capital moneys to, 461, 471
concurrence in, 472
maintenance of, 473
raising money for, 456, n.
infants, 494
incumbrances, effect of, 442, n.
leases by, 450 *et seq.*
And see "*Leases.*"
limited owners having powers of, 491 *et seq.*
lunatic, 496
mansion house, &c., restrictions as to sale of, 455
married woman, 495, 496
mines, reservation of, 448, 449

TENANT FOR LIFE—*continued.*
under S. L. Acts—continued.
mines, sale of, apart from surface, 456
setting aside part of rent of, 452
mining leases, power to grant, 446, 450 *et seq.*
money in Court under Lands Clauses Acts, 477
in hands of trustees under settlement, 478
moneys paid for lease on reversion, 478
mortgage for enfranchisement, &c., 456
for improvements, 456, n.
notice of intention to exercise powers, 481 *et seq.*
obligation of, as to repairs, insurance, &c., 473
partition, power to concur in, 449
possession, meaning of, 445
powers of, not assignable, 486
prohibition against exercise of powers void, 487
purchasers, protection of, 489
reference of differences to Court, 481
release of powers, void, 486
renewal of leases by, 453
restraint on anticipation does not affect powers, 496
sale of settled land by, 447 *et seq.*
special powers of, 453
surrender of leases, power to accept, 454
timber, power to cut, 478
trustee for all parties interested, 488
undivided shares, power to concur in selling, 457
waste, protection as to, 475
who is, under settlement on trust for sale, 229
where there are undivided shares, 442

TENANT IN TAIL,
disentailing assurances by, 521 *et seq.*
And see "*Disentailing Assurances.*"
dower and curtesy in respect of expired estates tail, 370, 371
leases by, 372
married woman seised *ex provisione viri*, 372
powers of S. L. Acts exerciseable by, 491

TERM OF YEARS,
bargain and sale vests, without entry, 763, n.
limitation of, to secure portions, 403
to secure rentcharge, not necessary, 765, n.

TIMBER,
cutting of, for repairs, 390
in due course of management, 392
impeachment of waste precludes from cutting, 389

TIMBER—*continued.*
personalty or realty, whether, 390
proceeds of, wrongfully cut, 391
statutory power to cut, 389, 478
what is, 388
windfalls, 393

TITLE,
accruer of, under M. W. P. Act, 1882...136, n.
covenants for, in settlements, 217 *et seq.*
defective, loan of trust funds on, 275, 278
investigation of, by trustee's solicitor, 274
lessor's, as to requiring production of, 275, 278

TOLLS,
rent includes, for purposes of S. L. Acts, 445

TRADE,
employment of trust funds in, 282

TRADER,
first life interest, where husband or wife is, 290
married woman, is subject to bankruptcy law, 135
voluntary settlement by, in fraud of creditors, 178, 179

TREES
planted for improvement not to be cut, 45

TRUSTEES
of separation deeds,
advisability of, 103
appointment of, 112
covenant by, for indemnity from wife's debts, 93, 112
of settlements (generally),
appointment of new, 339 *et seq.*
"continuing trustee," meaning of, 342
express powers for, generally unnecessary, 341
increase or reduction of numbers, 341
separate sets of trustees, 341
sole trustee, 343
statutory powers of, 339, 340, 341
modification of, 343
vesting of property on, 340
bare, protectors of settlement, 526, 528
delegation of powers to co-trustee, 344
devolution of estates, 657, n.
duty of, as to after-acquired property of wife, 549, n.
as to fire insurance, 398
as to investments, 255 *et seq.*, 275
as to leaseholds, 349, 350

TRUSTEES—*continued.*
of settlements (generally)—continued.
duty of, as to life assurance, keeping up policies of, 347
indemnity and reimbursement of, 343 *et seq.*
breach of trust at instance of c. q. t., 345, 346
costs of improper litigation, 351
innocent trustee, 345
professional services, 352 *et seq.*
Statute of Limitations pleadable, 355
statutory provisions as to, 344, 346, 355
receipts by, 335 *et seq.*
reversionary interest, 336
sales under Lands Clauses Act, 336
solicitor of trustees, payment to, 336 *et seq.*
solicitor-trustee on behalf of co-trustees, 339
several sets of, in real settlements, whether advisable, 688, n.
statutory powers of compounding, &c., 49, 356
of management, 228, 375, 694, n.
of sale, 225, 662, n.
of settlements (real),
application to Court for advice by, 490
appointment of, in settlement, 518
capital money not to be paid to fewer than two, 518
to be paid to, or into Court, 463
consents of, to sale, &c., of mansion-house, &c., 455
to sale of timber, 389, 478
contingent remainders, 389 *et seq.*
definition of, 443
exercise of powers by, consent of tenant for life necessary to, 490
execution of deeds, &c., by, necessary for exercise of their powers, 489
imperative powers vested in, 228 *et seq.*
investment of capital moneys by, 464
money in hands of, application of, 476
new, appointment of, by Court, 518
notice by tenant for life of intention to exercise powers to, 481 *et seq.*
powers of, during infancy of tenant for life, 494
protection of, 519, 520
receipts of, sufficient discharges, 519
reimbursement by, for expenses purposely incurred, 520
reference to Court of differences between tenant for life and, 481
sale, trust or direction for, 228 *et seq.*
saving of express powers of, 489
scheme for improvements, to be submitted to, 471
surviving or continuing, 519
tenant for life a, for all parties interested, 488
who are, under settlement of land in trust for sale, 229

TRUSTS,
breaches of, 343 *et seq.*
And see "*Breach of Trust.*"

TRUSTS—*continued.*
estates in land, devolution of, 657, n.
for children, &c., as husband and wife shall appoint, 299 *et seq.*
in default of appointment, 303
for investment, 264 *et seq.*
And see "*Investment.*"
for maintenance and accumulation, 304 *et seq.*
for next of kin of wife, 318 *et seq.*
for renewal of leases, 505 *et seq.*
for sale, mode of settling land on, 224, 236, 656, n.
of chattels, 241, 511 *et seq.*
copyholds corresponding with uses of freeholds, 234, 235
on trust for sale, 236
heirlooms, 511 *et seq.*
income, first life interest, 284
forfeiture on alienation or bankruptcy, 284 *et seq.*
discretion of trustees on, 286
restraint on anticipation, 291
leaseholds, 511 *et seq.*
mortgage money, disclosure of, 238
portions term, 403 *et seq.*
ultimate, in default of children, 315 *et seq.*

UNDIVIDED SHARE,
land includes, under S. L. Acts, 441
of personalty, settlement of, 239, 240
tenant for life may concur in dealing with, 449, 457

UNMARRIED,
meaning of term, 318

VALUE,
advance of trust funds must not exceed two-thirds, 273, 275, 277
duty of trustees to ascertain, of proposed security, 271, 275, 276

VARIATION
of contract by tenant for life under S. L. Acts, 475
investments, power of trustees for, 283
leases by Court under S. L. Acts, 451
settlements by way of rectification, 207 *et seq.*
And see "*Rectification.*"
on divorce, 316, 317

VOLUNTARY SETTLEMENT,
as against bankruptcy-trustee, void, 181 *et seq.*
absolute gift not a voluntary settlement, 182
capacity to pay debts, how tested, 183
composition and arrangement, rule applies to, 181

VOLUNTARY SETTLEMENT—*continued.*
covenants to settle property, 183, 184
interest of settlor liable to be divested, 184
married woman trading separately from husband, 184
meaning of "property" in Bankruptcy Act, 1883, s. 47...182
"settlement," 182
post-nuptial settlement, what consideration will support, 184
traders, present Act not limited to, 182
as against creditors, void, under 13 Eliz. c. 5...176 *et seq.*
antenuptial settlement to defeat creditors, 177
covenant by man to settle after-acquired property, 180
indebtedness of settlor, 178
intent to defraud must be proved, when, 177, 178
power to revoke settlement, 180
trader, settlement by, when void as against creditors, 178, 179
as against purchasers, void, under 27 Eliz. c. 4....167 *et seq.*
application of Act to lands only, 167
bargain between husband and wife, 175
children of former marriage, 171, 173
of future marriage, 172
consolidation of mortgages, 169
copyholds are within the Act, 169
equity of redemption, 169
illegitimate children, 172
judgment creditor not a purchaser, 169
leaseholds at nominal rent are within the Act, 169
limitations in favour of collaterals, 171
limits of consideration, 170 *et seq.*
mortgage subsequent to settlement, 168
mutual contract, 172
postnuptial settlement of wife's separate property, 175
purchase by husband from wife, 175
release of dower, 175
settlor and those claiming under him, bound, 168
strangers not bound by settlement valid as between husband and wife, 176
as against settlor, &c., enforcement of, 188 *et seq.*
actual transfer or declaration of trust, necessary to, 189
assignment of stocks and shares, 189
covenants for title by voluntary settlor, 194, 223
creditors, trusts in favour of, 190, 191
distinction between trust and contract to create trust, 189
grounds for impeaching, 192
incomplete gift not enforced, 188, 189
onus on person impeaching, 193
rectification, 192
trusteeship of, risks attaching to, 194
Bills of Sale Acts, registration of settled chattels, &c., under, 185, 186
Customs and Inland Revenue Acts, 186 *et seq.*
account duties, 186, 187

VOLUNTARY SETTLEMENT—*continued.*
avoidance of duty by settlement by deed done away with, 186
"interest reserved to settlor," what is, 188
what settlements are voluntary within the Acts, 187
maintenance, trust for, does not make father maintaining child a purchaser, 308

WARD OF COURT,
approval of settlement by, grounds of, 153
Infants' Settlement Act, 153
jurisdiction over, 156, 157
Married Women's Property Act, effect of, 158
settlement by, cannot be compelled, 144, 155

WASTE,
different kinds of, 387, 388
equitable, 388
permissible, 387
voluntary, 388
impeachment of, effect of, as to mines, 394
as to timber, 389
injunction to restrain, 392
protection as to, under S. L. Acts, 474
trustees, duties and liabilities of, as to, 396 *et seq.*

WATER,
leave, mining lease may include, under S. L. Acts, 450, n.
supply of, by limited owners, 468

WAYLEAVES,
leases of, under S. L. Acts, 450, n.
power to grant or reserve, under S. L. Acts, 455

WEEKLY TENANTS,
loan of trust funds on property let to, 273

WIDOW,
confirmation of settlement made in infancy by, 150
jointure, limitation of, for, 401 *et seq.*

WIFE. See also "*Married Woman.*"
acknowledgment of assurances by, 131
after-acquired property of, covenant to settle, 321 *et seq.*
And see "*After-acquired Property.*"
equity to settlement of, 214, 215
reversionary interest of, how settled, 244
reversionary interest of divorced, 316
separate estate of, 132 *et seq.*
And see "*Married Women's Property Act*, 1882."

WIFE—*continued.*
separation between husband and, 90 *et seq.*
And see "*Separation Deed.*"
trusts of income for, 290 *et seq.*
ultimate trusts of personalty settled by, 315, 316

WILL,
definition of, in S. L. Acts, 447
executory trusts in, how construed, 198
registration of, under Bedford Level Act, none, 2, n.
Middlesex Act, 2, 6
Yorkshire Act, 9 *et seq.*
testamentary gifts favouring separation, 95

WITHDRAWAL OF TRUST FUNDS,
power of, 334

WORKING CLASSES,
application of capital moneys in erecting dwellings for the, 470

WRITING,
confirmation of infant's contract, 151
lithographed memorial is in, 3, n.

YORKSHIRE REGISTRY. See "*Registry Acts.*"

YOUNGER CHILDREN,
portions for, 403 *et seq.*
And see "*Portions.*"
provision for, made in order for maintenance of eldest son, 310
who are, 404

INDEX TO THE PRECEDENTS.

ACCOUNTS,
of mining profits, &c., to be kept, 748
recital of approval of, 84

ACCRUER,
cross remainders, by way of, 642, 702, 772, 767, 772
in settlement on younger children, 611

ACCUMULATION,
destination of, of rents of settled lands, 696
power for, of proceeds of sale, 560
power to apply, in improvement of settled lands, 745
trust for, of income, absolutely discretionary, 644
of expectant shares, 548, n.

ACTION,
covenant not to prosecute, 74
recital of agreement to compromise, 70, 123
proceedings in, 70, 605, 606
release of, 56, 69

ADDITION TO TRUST FUNDS,
declaration of trusts of, 654
memorandum of, 655

ADMINISTRATION,
action for, recital of, 605

ADVANCEMENT,
powers of, in personal settlement, 547
short form, 621
real settlements, as to portions, 692
powers to charge sums for, 695
recital of, 83

ADVOWSON,
settlement of, 754
trust to present to, 758
sell, 759

AFTER-ACQUIRED PROPERTY,
covenant to settle generally, 549
specific, 531, 774
recital of agreement for settlement of, 544

AGENTS,
power for trustees to appoint, 663, 681

AGREEMENT,
articles of, on marriage, for settlement, 634
form of, for purchase of furniture on hire system, 803
recital of, for allowance to wife on separation, 117
compromise of action, 70, 123
covenant to pay annuity, 588, 592
gross sum, 582, 592, 628
family arrangement, 640
participation of children of former marriage, 602
purchase of rent-charge, 63
release, 56, 57, 59, 60, 64, 66
and distribution of trust funds, 84
separation, 113, 117
settlement of, after-acquired property, 544
to pay expenses and share profits, 63
terminate disputes by payment of money, 65

ALIENATION,
settlement by widow of life interest to restrain, 626
trusts of income till, 575, 603, 629

ANNUITY,
charge of, on settled personalty, 570
consent to provision of, under power in will, 831
covenants to pay, 588, 595, 674
power to appoint, to wife surviving, 619
proviso that trustees shall not compel payment of, 596
recital of payment of, 67
purchase of, 123
trust to pay, out of income of trust funds, 603

ANTICIPATION,
restraint of, general proviso as to, 586
trust of wife's income subject to, 545, 569
reversionary absolute interest, 549
life interest, 546, 559
settlement of income so as to restrain, 626

APPOINTMENT,
of agents, &c., power for, 663, 681
moneys, &c., to go with settled lands, 729

APPOINTMENT—*continued.*
of new trustees, in settlement pursuant to marriage articles, 637
power for, in personal settlement, 552, 622
real settlement, 698, 711, 730
where each party names his or her own, 590
rent-charge, power of, for husband, 705
wife, 694
settled lands among male issue, power of, 757, 771
under joint power, 716, 738, 756
trustees for purposes of S. L. Acts, &c., 698
trust funds, power of, among children, &c., 546, 556, 563, &c.
general, 548
in default of issue for settlor's benefit, 660
notwithstanding bankruptcy, 576
to cease on bankruptcy, 604, 704
proviso saving, as to unappointed funds, 625
recital of, under power, 80
trust for children in default of, 547, 563
daughters to take double shares, 569
ultimate trusts of corpus in default of, for husband, 556, 581, 584, &c.
wife, 548, 581, 621
validity of, notwithstanding foreign domicil, 638

APPORTIONMENT
of blended funds, power for, 579, 589, 659
rents on sales, 678

ARBITRATION,
clause for, in marriage articles, 635

ARRANGEMENT,
voluntary settlement to carry out family, 648

ARTICLES,
for a marriage settlement, 632
settlement pursuant to, 635

ASSIGNMENT,
of bond debt, 568, 580
chattels to go as heirlooms, 697
lease, covenant against, qualified, 821
leaseholds on trust for sale, 656, 677
to go with settled freeholds, 710, 751, 767, 774
life policies, 557, 577
mining plant to go with settled freeholds, 752
mortgage-debt, 565
portion, 572

ASSIGNMENT—*continued.*
of reversionary interest, 584, 602, 607
recital of, 68, 72, 699
share of residuary estate, 580, 592
stock in trade, &c., 620

ATTORNEY,
power of, to sue, &c., 621

AUDIT
of accounts of mines, &c., 748

BANKER,
power for, to receive policy moneys, &c., 552
to deposit trust securities with, 555
to pay income to wife's, 575

BANKRUPTCY,
power for husband to appoint, &c., notwithstanding, 576
clause negativing such power, 604, 704
for wife to appoint to husband life interest determinable on, 621, n.
trusts of income for husband till, 575, 630
maintenance, &c., of husband and family, discretionary, 576
of rents, &c., of settled land till, 700

BASE FEE,
deed to create, 791
to enlarge, 792

BENEFICE,
presentation to, form of, 848
trusts for, 758
sale of, trusts for, 759

BOND,
assignment of, 568, 580
declaration of trusts of moneys secured by, 568, 580
recital of title to, 567
settlement of sum secured by, 567, 579

BONUSES,
on policy, proviso as to, 560

BREACH OF TRUST,
indemnity against liability for, 85
recital of, 70, 80

BUSINESS,
license to use name in, 816
power to lend trust funds for purposes of, 617
recital that executors have continued, 75

BYE LAWS,
for regulation of a common, 841

CALLS,
power for trustees to pay, on shares, 555, 619

CAPITAL MONEYS,
application and investment of, forms of consent to, 827, 828, 829

CERTIFICATE,
of satisfaction of mortgage, 21

CHANCERY DIVISION,
recital of action in, 70, 605

CHAPEL,
trust deed of Nonconformist, 861

CHARGE,
power for husband to, income in favour of child, 575

CHATTELS,
settlement of, as heirlooms, 696

CHILDREN,
power to appoint to, of former marriage, 604
of intended marriage, 563, 569, 581
of second marriage, 550, 611
trusts for, in default of appointment, 547, 563, 581, 585
when daughters take double shares, 569
younger, of personalty, 609

CLAIMS,
mutual release of all, 52, 53
recital of disputed, 55

CODICIL,
recital of, 66, 733

COLLIERY. See "*Mines.*"

COMMON,
bye laws for regulation of, 841

COMPANY,
declaration of trusts of mining lease for, 820

COMPOSITION,
power for trustees to accept, of debt, 571

COMPROMISE,
of action, recital of, 70

CONFIRMATION,
of gift void for remoteness, 77
under unattested will, 812
of infants' settlements, 616
settlement by infant subject to, 613

CONSENT,
forms of, by separate instruments. See TABLE OF CONTENTS.
general proviso as to, to sales and investments, 593
of protector of settlement, disentailing deed with, 783, 785
surrender with, 788
form of, 782

CONTINGENT REMAINDERS,
not to be prejudiced by shifting clause, 719

CONTRACT,
recital of, for sale of land, 64

CONTRIBUTORY MORTGAGE,
power for trustees to lend on, 555

CONVERSION,
power to postpone, 779

CONVEYANCE,
of freeholds devised on trusts for sale to beneficiary, as realty, 833
of land for chapel and school, 861

COPYHOLDS,
covenant to surrender, 656, 676, 696
declaration of trusts of, till surrender, 677, 697
enfranchisement of, power for, 678
equitable estate in, disentailing deed of, 790
licenses to lease, power to grant, 679
surrender of, on marriage, 686
to bar entail, 787, 788

COSTS,
clause as to, in marriage articles, 635

COURT,
recital of order of, 606
ward of, settlement on marriage of, 605

COVENANTS,
in Releases,
Action, not to prosecute, 74
against incumbrances, 61
indemnity as to breach of lessee's covenants, 74
breaches of trust, 85
carrying on trade, 76
repairs of roads, &c., 88
succession duty, 68
in Separation Deeds,
annuity to husband, 125
wife, 114
chattels, &c. of wife to be her separate property, 115, 120
condonation of past offences, 114
custody of children, 121
further assurance, 122
indemnity against wife's debts, 116
living apart, 114
molestation, 114, 119, 124
proceedings for divorce, 119
in Settlements,
after-acquired property, settlement of, general, 549
specific, 631, 774
against incumbrances, 566, n., 815
bequest to child of equal share, 596
confirmation of infant's settlement, 615
further assurance, 607, 621
life assurance, keeping up policies of, 559
making up income to specified amount, 653
payment of annuity, 588, 595, 674
gross sum, 562, 583, 594
in respect of specified after-acquired property, 631
interest, 583, 598
quiet enjoyment, 621
surrender of copyholds, 656, 676, 696
settlement of sum secured by, 562

CREDITOR,
release by, 54

CRICKET,
license to use lands for, 835

CROSS REMAINDERS,
as to personalty, 642
realty, in tail, 702, 767, 772

DAUGHTERS,
limitation to, in tail, as tenants in common, 702
successively, 718, 743

DEBTS,
composition for, power to accept, 571
mortgage, assignment of, 565
recital of state of, 564
recital of payment of testator's, 734
release of, 54
statutory declaration as to payment of testator's, 826

DECLARATION OF TRUST,
by reference to deeds of even date, 565, 573
former settlement, 654
trusts declared of other property, 577, 594, 642
uses declared of freehold, 697
form of guarantee fund, 816
after-acquired property, 550
annuity, 588, 596
bond debt, 568
copyholds, till surrender, 677, 697
gross sum secured by covenant, 578, 584, 595, 599, 631
income under former settlement to restrain anticipation, 626
lease of quarries, 820
mortgage debt, 568, 818
policy moneys, 558, 577, 594, 604
portion, 574
proceeds of sale of land, 665
rents and profits till sale, 666
reversionary interest, 584
scheduled personalty, 553, 617, 637
realty, 675
share of residue under a will, 593
stock added to settlement, 644
of husband, 580
wife, 545
sum of money, 643

DECLARATION, STATUTORY,
as to identity of parcels, &c., 822
payment of testator's debts, &c., 826
pedigree, 824

DEEDS,
declarations of trusts, by reference to deed of even date, 565, 573
deposit of, for safe custody, power for, 555
memorials of, 19

DEPOSIT,
power to, trust securities for safe custody, 555

DETERMINATION,
power for trustees, as to, of disputes, 632, 659, 682
trusts of settlement, 648

DIGNITY,
shifting clause on accession to title of, 720

DIRECTION. See "*Consent.*"

DISCRETIONARY TRUST,
till husband's bankruptcy, of income of trust funds, 576
rents, &c., of settled lands, 701

DISENTAILING ASSURANCES,
precedents of. See TABLE OF CONTENTS.
recital of, 56, 714, 737
effect of settlement and, 754

DISPUTES,
arbitration clause as to, in marriage articles, 635
power for trustees to determine, 632, 659, 682

DISSENTING CHAPEL,
trust deed of, 861

DISTRIBUTION
of trust funds, release on final, 79, 82

DOMICIL,
proviso as to validity of appointments notwithstanding foreign, 638

DOWER,
release of, 57

ECCLESIASTICAL LEASES,
building, with consent of Patron and Commissioners, 854
farming, with consent of Patron and Bishop, 849

ELDEST SON,
limitation of rent-charge to, in resettlement, 716, 740
trust of personalty for children other than, 609

ELECTION,
conveyance of lands devised on trust for sale, to beneficiary as realty, 833

ENGLISH LAW,
proviso that settlement shall be regulated by, 639

ESTATE FOR LIFE,
limitations of, in strict settlement, 690, 701, 717, 740, 757

ESTATE TAIL,
limitation of, to children as tenants in common, 767, 772
daughters as tenants in common, 702
successively, 718, 743
sons successively, 690, 702, 717, 742, 758

EXCHANGE,
power of, 658
statutory powers of, extension of, 707

EXECUTORS,
assent by, to bequest of leaseholds, 808
license by, for uses of name of deceased partner in firm, 806
proviso that release shall not extend to claims as, 52
release to, 67, 69, 75
trading by, recital of, 75

FAMILY,
recital of state of, 56, 58, 83, 623, 643, 714, 735, 792, 834
title and estates, shifting clause on accession to, 720

FATHER,
covenant by, to bequeath equal share to child, 596
pay annuity, 588, 595
gross sum, 562, 594
power for, to charge gross sum in resettlement, 740
powers of, under original settlement, restoration of, 741

FEE-FARM RENTS,
power to sell for, 679, 707

FEE SIMPLE,
limitations in defeasible, 772, n.
ultimate limitations of, in strict settlement, 690, 702

FIRM,
license to use name of deceased partner in, 806

FOREIGN FUNDS,
power to invest in, 554
settlement of, 553

FOREIGNER,
settlement on marriage of Englishwoman with, 635

FORMER MARRIAGE,
power to appoint trust funds to children of, 604

FREEHOLDS,
conveyance of, in strict settlement, 689
on trust for sale, 656, 661, 676
to legatee of proceeds of sale, as realty, 833
disentailing deed of, 780, 782, 783
recital of title to, for life, 782
in fee, 672, 675, 699, 769
tail, 781, 783, 791
reversionary share in, settlement of, 769

FURNITURE,
agreement for purchase of, on hire system, 803
power to purchase, out of trust funds, 646

FURTHER ASSURANCE,
covenants for, 607, 815

GIFT,
confirmation of void, 77

GROSS SUM,
covenant for payment of, and interest, 583, 594
in respect of specific after-acquired property, 631
power for tenant for life to charge, for advancement of younger children, 695
for his own benefit, 740
for trustees to forbear enforcing covenant for payment of, 583, 595, 631
to raise, for wife's benefit, 589
for wife to borrow, on life interest and policy, 570
settlement of, secured by covenant, 562, 582

GUARANTEE FUND,
deed of declaration of trusts of, 816

HEIRLOOMS,
settlement of chattels as, 697

HIRE SYSTEM,
agreement for purchase of furniture on, 803

HOTCHPOT CLAUSE,
in personal settlements, common form, 547
short form, 604
as to moneys payable under covenant, 597
settled for younger children, 611
in real settlements, as to portions, 692

HUSBAND,
covenant by, to pay sum and interest, 583
in respect of specific after-acquired property, 631
power for, to appoint notwithstanding bankruptcy, 576
exercise of such power negatived, 604, 704
to jointure future wife, 694, 726
to nominate his own trustees, 590
to withdraw funds from settlement, 590
power for trustees to lend funds to, 617
to pay wife's income to, 575
wife to appoint funds to, 550, 611
to appoint rentcharge to, 705, 744
to bequeath life interest to, 563
trusts of income for, first life interest, 555, 580, 585
second life interest, 563, 569, 581, &c.
survivor of wife and, 546
till bankruptcy, 575, 630
of rents of settled lands for, till bankruptcy, 575, 630
ultimate trust for, in default of issue, 556, 581, 584, &c.

IMPROVEMENT OF SETTLED LANDS,
extension of statutory powers of, 708
power to apply accumulations of income in, 745

IMPROVIDENT PERSON,
voluntary settlement for benefit of, 643

INCOME,
accumulations of, power to apply, in improvements, 745
covenant to make up to agreed amount, 653
declaration of trusts of, under former settlement to restrain anticipation, 626
power to pay wife's, to bankers or husband, 575
trust for accumulation of, during minorities, 548, n.

INCOME—*continued.*
trust for maintenance out of, 547, n.
trusts of, for children, in post nuptial settlement, 641
for husband, first life interest, 555, 580
second life interest, 546, 563, 569, &c.
subject to charge for maintenance of wife and children, 618
for improvident person, &c., discretionary, 644
for wife during joint lives of self and husband, 545
first life interest, 559, 563, 569, &c.
second life interest, 555, 580, 603, &c.
where funds are separate, 585, 629
husband's interest determinable, 575, 603, 629, 630
parties take first interests in each other's funds, 629
surviving husband takes a moiety, 624
widow takes a moiety, 556, n.

INCUMBRANCES,
covenants against, 566, n., 815
primary liability to, provisions as to, 750, 760

INDEMNITY,
to executors, as to use of name of deceased partner in firm, 806
remainderman, as to tenant for life's incumbrances, 761
trustees, against lessee's covenants, &c., 74, 588, 685
as to carrying on trade, 76
life policies, 561
loan of trust funds on personal security, 618, 647
non-enforcement of covenants, 631
non-renewal of leases, 776
unmarketable title, 552

INFANT,
accumulation of income of share of, 548, n.
confirmation of settlement made by, 616
settlement on marriage of, subject to confirmation, 613
with sanction of Court, 605

INSTALMENTS,
payment of, on purchase of furniture, 803, 804

INSURANCE
of furniture sold on hire system, 804

INTEREST,
covenant to pay, on sum secured by covenant, 583, 598

INVENTORY
of heirlooms to be taken, 698

INVESTMENT,
clauses, by way of reference, 578, 629
comprehensive range, 554
fair range, 558
restricted range, 562
statutory investments only, 545, 620
variation of investments, power for, 545, 620
consents to, by separate instruments, 827, 828
general proviso, as to, in settlement, 593
power to continue existing, 545, 569, 608
invest in purchase of land, 586
residence, 599
unauthorised, trust to get in, 608

ISSUE,
power to appoint settled lands among, 757
trust for, as husband and wife appoint, 546
ultimate trusts for husband in default of, 556
wife in default of, 548

JOINTURE,
charge of, by way of marriage settlement, 762
limitation of, 690
increased, 741
to wife of eldest son, 716
power to charge, 694, 726
release of, 58
proviso as to, in shifting clause, 722
release of, 60, 738
term to secure, limitation of, 700
trusts of, 702

JUDGMENT,
memorial of, 22

LAND,
power to lease, 587
manage, 587
purchase, 586, 657

LAWN-TENNIS,
licence to use land for, 835

LEASE,
declaration of trusts of, of quarries, 820
ecclesiastical, agricultural, 849
building, 854
power for trustees to grant agricultural, 663, 682
building, 663, 684

LEASE—*continued.*
power for trustees to grant mining, 663, 683
of purchased lands, 587, 659
licences for, of copyholds, 679
powers, statutory, of granting, extension of, 706 *et seq.*, 745 *et seq.*
long leases, 706
mining leases, renewal and variation of, 745
rents not to be capitalised, 706
varying with market price of minerals, 745

LEASEHOLDS,
assent to bequest of, 808
assignment of, on trust for sale, 656, 677
to go with settled freeholds, 710, 751, 767, 774
recital of, 68, 72
indemnity to trustees in respect of, 588
renewal of, trusts for, 775
title to, recital of, 675, 699, 737

LEGACY,
recital of, 613
charged on land, 65
release of, demands in respect of, 6
lands charged with, 65
settlement of, 613

LICENSE,
form of, to use land for cricket and lawn-tennis, 835
name of deceased partner in firm, 806
pleasure ground in a square, 837
power to grant, for leasing copyholds, 679
revoke for user of land, 837, 839

LIFE ASSURANCE,
assignment of policies of, 557, 577
bonuses, proviso as to application of, 560
covenants to keep up, 559
declarations of trusts of, 558, 577, 594
indemnity to trustees in respect of, 561
power for solicitor or banker-trustee to receive policy moneys, 552
trustees to apply income or capital to keeping up, 578
sell or surrender, 560
premiums to be paid out of income of trust funds, 571, 578
recital of title to policies, 557
settlement of policies of, 557, 591, 601
trusts of policies, 570

LIFE ESTATE,
limitations of, in strict settlement, 690, 701, 717, 740, 757

LIFE INTEREST,
power for wife to bequeath, to husband, 363, 621, n.
borrow on, and policy, 570
settlement by widow of, to restrain alienation, 626
where husband and wife take first, in each other's property, 627

LOAN,
power for trustees to make, on contributory mortgage, 555
to husband, 617
to improvident person, 647
wife to borrow, on life interest and policy, 570

MACHINERY,
settlement of mining, to go with settled lands, 75

MAINTENANCE,
power to charge settled lands with, 695
proviso as to, out of rents of land, 773
trust of income, charged with, 618
for, in personal settlement, 547, n.
on husband's bankruptcy, 576
in real settlement, as to portions, 692

MANAGEMENT,
powers of, 587, 647, 663, 681

MANSION-HOUSE,
consent of trustees to sale of, 850
power for tenant for life to sell, 707

MARRIAGE,
future, power to charge portions for children of, 694
jointure wife on, 694
provide out of trust funds for husband and children of, 550
intended, recital of, 544
trusts till, of personalty, 545, 553
realty on trust for sale, 648, 661, 668, 676
uses till, of realty, 689, 700, 716
recital of, 58, 83
and birth of children, 117

MARRIAGE ARTICLES,
precedent of, 632
recital of, 636

MEMORIAL. See TABLE OF CONTENTS.

MINES,
accounts of profits, &c., of, to be kept, 748
power for tenant for life to lease, at rents varying with price of minerals, 745
rents not to be capitalized, 706
to renew leases of, without surrender, 745
to work, and to use plant in, 747 *et seq.*, 752
power for trustees to lease, 663, 683
rents of, not to be capitalized, 706
shares in, settlement of, 769
trusts of plant, &c., of, to go with settled freeholds, 752

MINORITY,
accumulation of income during, trust for, 548, n.

MORTGAGE,
assignment of debt secured by, 565
conveyance of lands comprised in, 566
memorial of, 21
power to, statutory, extension of, 708
powers to raise money by, 670, 740, 775
primary liability of lands to, provisoes as to, 750, 760
recital of, 64, 567
release of part of lands charged from, 64
satisfaction of, certificate of, 21
second or contributory, power for trustee to lend on, 555
settlement of sum secured by, 567, 639
transfer of, on settlement, 564
recital of, 567, 640

NAME AND ARMS CLAUSE, 718

NEXT OF KIN,
ultimate trust for wife's, 549

NOTICE,
statutory, to trustees of settlement, dispensed with, 706

OCCUPATION,
of residence, proviso as to, 600, 622

PARCELS,
statutory declaration as to identity of, 822

PARK,
power for tenant for life to sell, 707

PARTITION,
power of, 669

PEDIGREE,
statutory declaration as to, 824

PIN MONEY,
charge of, under power, by way of marriage settlement, 762
limitation of, 689

POLICY. See "*Life Assurance.*"

PORTIONS,
advancement clause, 692
assignment of, on marriage, 572
charge of, under power, by way of marriage settlement, 762
maintenance clause, 692
power to charge, 694, 726, 728
release of, 58
create specific securities for, 693
limit term to secure, 693, 696
require to be raised in parent's lifetime, 692
proviso as to, in shifting clause, 723
recital of title to, 572
settlement by way of charge of, under a power, 762
settlement of, on marriage, 573
term to secure, limitation of, 590, 702, 717, 765
trusts of, 590, 703, 724

POST-NUPTIAL SETTLEMENT,
pursuant to marriage articles, 635
voluntary, 639

POSTPONEMENT,
of sale and conversion, power for, 779

POWERS,
in Settlements,
accumulation of proceeds of sale, 560
advancement out of personalty, 547, 621
realty, 692
to charge for, 695
annuity to wife surviving, appointment of, 619
application of accumulations to improvements, 745
trust funds to keeping up policies, 578
appointment of agents, 663, 681
annuity, 619
new trustees, of personal settlement, 552, 622
real settlement, 698, 711, 730

POWERS—*continued.*
in Settlements—continued.
appointment of new trustees where each party appoints his or her own trustees, 590
rentcharge for husband, 705, 744
wife, 694
settled lands among children, 757, 771
trustees of settlement for purposes of S. L. Acts, &c. 698
trust funds among children, &c., 546, 556, 563, &c.
of former marriage, 604
second marriage, 550, 611
general, 548
in default of issue, for settlor's benefit, 660
notwithstanding bankruptcy, 576
to cease on bankruptcy, 604, 704
husband by will, 563
proviso saving, as to unappointed fund, 625
apportionment of blended funds, 579, 589, 659
rents on sales, &c., 678
appropriation of streets, &c., 680
borrowing on life interest and policy, 570
business, loan of trust funds for purposes of, 617
calls on shares, payment of, 555
charging gross sum, 740
income in favour of child, 575
jointure, 694, 726
release of, 58
portion, 694, 726, 728
release of, 58
composition of debts, &c., 571
contributory mortgage, loans on, 555
copyholds, enfranchisement of, 678
granting licenses to lease, 679
determination of questions as to value, &c. 632, 659, 682
trusts of voluntary settlement, 648
exchange of lands, 658, 678
forbearance to enforce payment of sums, 583, 595, 631
grant of licenses for lease of copyholds, 679
investments, continuance of existing, 545, 569, 608
variation of, 545
leasing, agricultural, 663, 682
building, 663, 684
mining, 663, 683
loan of trust funds on contributory mortgage, 555
personal security, 617
maintenance, charge of settled lands with, 695
management of lands, 587, 647, 663, 681
mortgage, contributory, loans on, 555
extension of statutory power, 708

POWERS—*continued.*
in Settlements—continued.
mortgage, raising of money by, 670, 740, 775
partition, 669
payment of calls on shares, 519, 555
income of wife to bankers or husband, 575
postponement of sale and conversion, 779
purchase of lands, 586, 657
residence, 599, 646
settled lands by tenant for life, 709
extension of statutory power, 707
raising money for wife's benefit, 589
receipt by solicitor of policy moneys, 552
revocation of voluntary settlement, 642, n.
sale of land for fee-farm rents, 679
life policy, 560
mansion-house, park, &c., 707
securities, creation of specific, for portions, 693
term to secure portions, limitation of, 693, 696
under original settlement, restoration of, 742
withdrawal of trust funds by husband, 556, 590
wife, 550, 556, n.
in Special Precedents,
assignment of lease to trustees of company, 821
determination of license to use land, 837, 839
re-entry in lease, 853
seizure of effects on non-payment of instalments, 804
release of, 58

PRESENTATION,
to benefice, form of, 848
trusts for, 758

PRIORITY,
of incumbrances, 760
jointure and portions, 727, 728
several parts of same mortgage debt, 819

PROFESSIONAL TRUSTEES,
power for, to charge for services, 552

PROTECTOR OF SETTLEMENT,
consent of, to barring entail, 782

PURCHASE,
agreement for, of furniture, on hire system, 803
power for, of land, 586, 657
residence, 599, 646
statutory, extension of, 707
tenant for life to make, of settled lands, 709
recitals of, of lands, 735

RAILWAY SHARES,
settlement of, 553
transfer of, recital of, 553

RECITALS,
in Releases,
of action in Chancery Division, 70
advancement to son, 83
agreement for compromise of action, 70
purchase of rentcharge, 63
release, 56, 57, 59, 60, 64, 66
release and distribution of trust fund, 84
release of right of way and new grant, 87
to pay expenses and share profits, 53
terminate disputes by payment of money, 55
amount of profits divisible, 54
appointment of share to daughter, 80
trustee, 75, 80, 83
approval of accounts of trustees, 84
assignment of leaseholds, 68, 72
breaches of trust, 70, 80
claims disputed, 55
codicils, 66
contract for sale of mortgaged lands, 64
conveyance of land on trust for sale, 672
dealing, between parties, 53, 55
death of executor insolvent, 70
husband, 57, 83
testator and probate of will, 62, 66, 75, 79
testator's widow, 80
tenant for life, 58, 60, 69
trustee, 83
wife, 83
devise of lands subject to rentcharge, 62
disentailing assurance, 56
grant of right of way, 87
incapacity of *cestui qui trust*, 75
legacy charged on land, 65
marriage, 58, 83
mortgage, 64
payment of annuity, 67
income to husband till death, 84
rentcharge, 62
payment and transfers of trust property, 68, 72, 81
question as to validity of bequest, 77
rentcharge, 62
sale and conversion of estate of testator, 79
settlement, 56, 64, 80, 82
state of family, 56, 58, 83

RECITALS—*continued.*
in Releases—continued.
of state of mortgage debt, 64
trust property, 68, 80, 83
trading by executors, 75
waste by tenant for life, 56
will, 65, 67, 69, 79
in Separation Deeds,
agreement for allowance to wife, 117
compromise of divorce action, 123
separation, 113, 117
marriage and birth of children, 117
purchase of annuity for husband, 123
transfer of stock to trustees, 118
in Settlements, &c.,
administration, 605
advance to child, 735
agreement for apportionment of incumbrances, 756
charge of jointure and portions, 763
conveyance on trust for sale, 676
family arrangement, 640
payment of annuity, 588, 592
gross sum, 582, 592, 628
release of jointure, 736
re-settlement of family estates, 715, 735, 756
settlement of after-acquired property, 544, 665
that child of former marriage shall share, 602
wife has attained full age, 616
to settle after-acquired property, 545, 628
bond debt, 567
in exercise of power of withdrawal, 623
infant's property with sanction of court, 606
land in strict settlement, 699
life interest in settled funds, 626
life policy, 557, 592, 601
mortgage debt, 564
portion, 572
realty by deed of even date, 606
share of freeholds, 672
residuary estate, 592
sum secured by covenant, 582
confirm settlement, 676
appointment of new trustee, 654
portion, 574
charge of jointure and portions, 734
consent of protector to barring entail, 784
conveyance of land for sale, 665, 686
death of former husband, 623
protector of settlement, 792
trustee, 623, 636, 654, 735

RECITALS—*continued.*
in Settlements, &c.—continued.
desire to bar entail, 786
create base fee, 791
enlarge base fee, 792
disentailing assurance, 714, 737
incumbrances on land, 735
intended marriage, 544, 605, 626, 664
sanction of court to, 606
intention that settlement shall be regulated by English Law, 637
investment, loss by depreciation of, 650
of proceeds of sale of settled lands, 786
lease, 699
mesne assignments of, 699
marriage articles, 632
mortgage debt, state of, 564
payment of gross sum by husband, 628, 643
policy effected in name of settlor, 557, 574
names of trustees, 592
proceedings in Chancery Division, 605 *et seq.*
purchase of lands, 735
sales, &c., settled lands, 713, 762, 785
settlement creating estate tail to be barred, 785
power of charging jointure, and portions, 762
of infant, sanction of Court to, 606
on former marriage, personal, 622
marriage of tenant in tail's parents, 712
that scheduled lands are subject to, 714
state of family, 623, 643, 714, 735, 792
mortgage debt, 564
trust funds, 623, 649
strict settlement of freeholds, 712
and disentailing assurance, effect of, 755
title to bond debt, 567
copyholds, 790
scheduled, 675
freeholds for life, 782
freeholds in fee, 675, 699
undivided share in, 672, 769
in tail, 781, 783, 791
leaseholds, 699
scheduled, 675, 737
legacy, 613
life policy, 557, 592
mortgage debt, 567
portion, 572
reversion under settlement, 582
and appointment, 671
will, 605
and appointment, 672

RECITALS—*continued.*
in Settlements, &c.—continued.
title to share of lead works, &c., 769
residue, 580, 591, 601
settled trust funds, 632
reversionary, of freeholds, 769
shares of property from various sources, 649
stocks, &c., 613, 617, 618, 632
transfer to trustees of mortgage, 567, 670
railway shares, 553
scheduled personalty, 553, 613, 715
shares in mines, 771
stock, 544, 580, 613, 640, 654
trust funds generally, 637
intended, 715
voluntary settlement, desire to make, 643
will bequeathing legacy, 613
reversionary share, 591, 601, 605
creating strict settlement, 731
in Special Precedents,
appointment of secretary of hospital, 816
arrangements as to use of firm's name, 806
family, state of, 834
lease of slate quarries, 820
mortgage debt, state of, 818
proposal for guarantee, 816
retirement from firm and new partnership, 806
will unattested, 814

RELEASE,
of jointure, on resettlement, 739
sale of lands charged, 60
Precedents of. See TABLE OF CONTENTS.

REMAINDERS,
contingent, not to be prejudiced by shifting clause, 719

RENEWAL OF LEASES,
trusts for, in settlement, 775

RENTCHARGE,
limitation of, by way of jointure, 670
additional or increased, 741
to wife of eldest son, 716
of pin-money, 689
to eldest son in resettlement, 716, 740
power to appoint, to husband, 705, 744
wife, 694
recital of, 62
release from, of part of lands charged with, 60
of, to owner of fee, 62
term to secure, limitation of, 700

RENTS,
accumulation of, during minorities, 696
apportionment of, power for, 678
fee-farm, power to sell for, 679
indemnity to trustees in respect of, 74, 588, 685
mining, not to be capitalized, 706
variation of, with price of minerals, 745
surplus to be taken by reversioner, 694
trusts of, of purchased lands, 587
till bankruptcy, 674
sale of lands, 700

REPAIRS,
of furniture sold on hire system, 804

RESETTLEMENTS,
Precedents of, 712, 730, 754

RESIDENCE,
power to purchase, 599
proviso as to occupation of, 600

RESIDUE,
settlement of share of, 579, 591

RESIDUARY LEGATEE,
release to executors by, 67, 69

RETIREMENT OF TRUSTEE,
release by beneficiaries on, 85

REVERSIONARY INTEREST,
in personalty, assignment of, 584, 607
covenant to make up, 588
recital of title to, under settlement, 582, 691
will, 601, 605, 672
restraint on anticipation of, 546, 549
settlement of, 582, 591, 601, 605
in realty, settlement of, 769

REVERSIONER,
surplus rents to be taken by, 694

REVERTER CLAUSE, 721

REVOCATION,
of license to use land, powers of, 837, 839
settlement, deed of, 860
power of, 642, n.

RIGHT OF WAY,
release of, 86, 87

SALE,
consents to, general proviso as to, 593
conveyances of land in trust for, 661, 667, 675
power for, of land for fee-farm rents, 679
of life policy, 560
powers of, extension of statutory, 707
recital of, of settled lands, 713, 762, 785
testator's estate, 79
settlements of proceeds of, of lands conveyed, 664
trust for, conveyance of lands devised on, as realty, 833
conveyance of lands on, 661, 667, 675
settlement of lands on, 656

SATISFACTION,
of mortgage, certificate of, 21

SCHEDULE,
recital that lands in, are now subject to settlement, 714
settlement of personalty by reference to, 553, 591, 606, 613, 617
realty by reference to, 656, 675, 688, 699, 712, 731, 769

SCHOOL,
trust deed of Nonconformist, 861

SECURITIES,
power for trustees to create specific, for securing portions, 693

SETTLED LAND ACTS,
appointment of trustees for purposes of, 698
exchange, power to, extended, 707
extension of powers given by, 705 *et seq.*, 745 *et seq.*
fee-farm grants, power to sell for, notwithstanding, 707
improvements without certificate or order required by, 708
investment, powers of, extended, 707
long leases, notwithstanding, 706
mansion-house, power to sell, notwithstanding, 707
mining leases, renewal of, without surrender, 745
rents arising under, not to be capitalized, 706
varying with market price of minerals, 745
mortgage for purposes not specified in, power to, 708
notice to trustees under, dispensed with, 706
purchase, power to, extended, 707
sole trustee may act for purposes of, 709
tenant for life, may purchase settled lands, 709

SETTLEMENT,
covenant for, of after-acquired property, 549
Precedents of. See TABLE OF CONTENTS.
recitals of, general, 56, 64, 82
creating estate tail to be barred, 785
power of charging jointure, &c., 762
effect of, and disentailing assurance, 755
of infant, sanction of Court to, 606
on former marriage of personalty, 622
on marriage of tenant in tail's parents, 712
strict, of freeholds, 712
and disentailing assurance, 755
statutory declaration of no, on marriage, 826

SHARES,
in mines, settlement of, with realty, 769
of freeholds and leaseholds, settlement of, 769
of residue, settlement of, 579, 591
power to pay calls on, 555, 619
railway, settlement of, 553

SHIFTING CLAUSE,
name and arms clause, 718
on accession to title and estate, 720

SOLE TRUSTEE,
may act for purposes of S. L. Acts, 709

SOLICITOR,
power for, to charge for services, 552

STOCK,
addition of, to trust funds, declaration of trusts of, 654
memorandum of, 655
disentailing deed of, 787
settlement of, in possession, 545, 579, 613
in reversion, 601
transfer of, recital of, 544, 580, 613, 640, 654

STREETS,
power to appropriate and lay out, 680

SUCCESSION DUTY,
indemnity against, 68

SURRENDER,
of copyholds on settlement, 686
to bar entail, 787, 788

SURRENDER—*continued.*
of copyholds, covenants for, 656, 676, 696
declaration of trusts till, 677, 696
policy, power for, 560
term for securing rentcharge, 60

SURVIVOR,
power to, of appointment to issue, 546, 556
trust of income for, of husband and wife, 546

TAIL. See "*Estate Tail.*"

TENANT FOR LIFE,
power for to purchase settled lands, 709
statutory powers of, extension of, 705 *et seq.* See "*Settled Land Acts.*"

TENANTS IN COMMON,
limitation to daughters as, in tail, 702
children as, in tail, 767

TERM OF YEARS,
surrender of, 60
to secure jointure, limitation of, 700
trusts of, 702
portions, limitation of, 690, 702, 717, 765
power to limit, 693, 697
trusts of, 690, 703, 724

TITLE,
of dignity, shifting clause on accesion to, 720
recitals of. See "*Recitals.*"

TRADE,
indemnity against loss of, by carrying on testator's, 76
recital that executors have continued, 75
stock in, assignment of, 620

TRADER,
settlement on marriage of, 617, 620

TRANSFER,
on release of trust property, 68, 72, 81, 118
settlement of, mortgage, 564
recital of, 567
of stock, recital of, 544, 580, 613, 640, 654

TRUST,
breach of, indemnity in respect of, 85
recital of, 70, 80
declarations of. See "*Declarations of Trust.*"
of income. See "*Income.*"
ultimate, of *corpus* for husband, 556, 581, 584, &c.
wife, 548, 581, 625

TRUSTEES,
appointment of. See "*Appointment.*"
indemnity of. See "*Indemnity.*"
notice to, under S. L. Acts, dispensed with, 706
powers of, in settlements. See "*Powers.*"
releases to, 79, 82, 85
sole trustee of settled lands may act, 709

TRUST FUNDS,
blended, power to apportion, 579, 589
investment of, 545, 554, 558, 562
And see "*Investment.*"
power to apply, in keeping up policies, 578
raise sum out of, for wife's benefit, 589
withdraw, from settlement, 550, 556, 590

UNDIVIDED SHARE,
of personalty, settlements of, 591, 601, 605
realty, on trust for sale, conveyance of, 667
settlement of, 769

VARIATION,
of investments, power for, 545

VOLUNTARY SETTLEMENT,
for improvident relative and his family, 643
post-nuptial, 639
pursuant to family arrangement, 648
recital of desire to make, 643
revocation of, deed of, 860
power of, 642, n.

WARD OF COURT,
settlement on marriage of female, 605

WASTE,
recital of, by tenant for life, 56

WAY, RIGHT OF,
recital of grant of, 87
release of, 86, 87

WIDOW,
settlement by, under power of withdrawing trust funds, 622
on marriage of, to restrain alienation, 626

WIFE,
power for, to appoint trust funds on future marriage, 550
bequeath life interest to husband, 563
borrow on life interest and policy, 570
nominate her own trustees, 550
withdraw trust funds from settlement, 550
to pay income of, to bankers or husband, 575
raise sum for benefit of, 589
trusts of income for, during joint lives of self and husband, 545
first life interest, 559, 569
second life interest, 555
ultimate trusts of *corpus* for, in default of issue, 548, 581, 625
use to, in fee, limitation of, 702

WILL,
memorial of, 23
recital of, 65, 67, 69, 79
bequeathing legacy, 613
residuary share, 591, 601, 605
creating strict settlement, 731
devising lands on trust for sale, 833
probate of, 733, 834
unattested, confirmation of devise in, 812

WITHDRAWAL OF SETTLED FUNDS,
power for, by husband on second marriage, 590
substituting others, 556
wife, 550, 556, n.
settlement by widow under power of, 622

YOUNGER CHILDREN,
power to charge portions for, of future marriage, 694
trusts of personalty for, 609
portions for, 690

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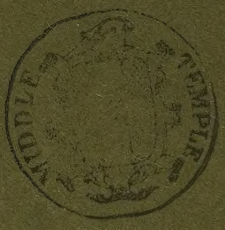
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